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Code of Tribal Custom by Sant-Ram Sogra.

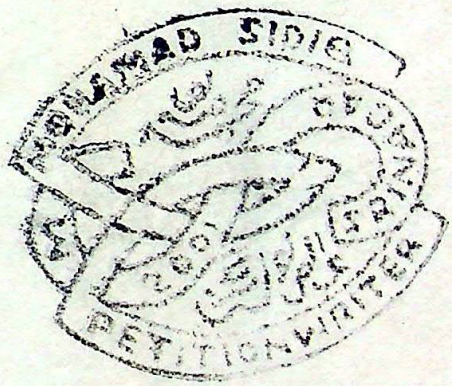
—o—

Board of Judicial Advisers

Krishen Koul V/s Shardena Kour

1943 July 8 J & K.

"... this Code of Tribal Custom is a book of authority on Custom in the State."



1940 Lah 493 = Shahidganj Case (see Mulla page 2)

In Cases of Shiahs or Mohamadan Law, it is the duty of the Courts to interpret the Law and not to depend upon the opinion of experts however learned.

—o—

"Jones Works" (based on no 1st) see Jayab-Jee page 820.

I am strongly disposed to believe that no possible question could occur on the Mohamadan Law of succession which might not be rapidly and correctly answered.

—o—

...madan Law (by Mulla) Page 2:— Justice, equity and ...d Conscience. should not be applied, to Mohamadans, ...ose matters expressly directed by the Legislature to ...pplied to Mohamadans, such as Rules of ...cession, though they may not conform ...e opinion of the Court with justice, equity & good Conscience.

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1963 J&K 4. There is a well established Custom in the Valley, under which a Khoma Nishin daughter inherits the property of her father just like a son and excludes other sisters, if any.

There is no well established Custom to the effect that if a daughter fails to establish her status as Khoma Nishin daughter she cannot succeed to the property even as a daughter simpliciter under Mohamadon Law; such a Custom has to be specifically pleaded and established independent & cogent evidence by the party who seeks to rely on such Custom

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A DIGEST

OF

CUSTOMARY LAW OF KASHMIR

As at present judicially ascertained; and as specified in the Rivaj-i-am.

By

NILA KANTH GANJOO, B. A., LL. B., K. C. S. (Judicial)
Subordinate Judge

Revised and Enlarged

Specially incorporating chapters on Dukhtari Khana Nashin, Appointment of an Heir, Succession, Marriage, Dower, Divorce, and Wills.

"It is better that law should be certain than that every Judge should speculate upon Improvements in it".—

Per Lord Eldon in *Sheddon* V. *Goodrich*, 8 Ves. 497

"Custom cannot be extended by logical process. It must be established inductively not deductively. It can be established only by instances and not by *priori* methods. Custom can never be a matter of theory but must always be a matter of fact"—

Per Mr. Justice Le Rossignol.

APRIL 1959.

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PREFACE TO THE REVISED EDITION

More than a decade has elapsed since the publication of the first edition of this "Digest" and as the whole issue of the first edition has been sold out, it has been found necessary to publish a new edition. During this period neither the legislature nor the highest Appellate Court of Kashmir has remained inactive as a natural consequence of which it has become inevitable to make many additions, alterations and amendments to the previous edition. In fact, I should say, many topics have not merely been thoroughly revised but have been mostly re-written and the discussions enriched with reported and unreported case law of the highest Civil and Revenue Courts of the state and valuable quotations from the Rivaj-i-am. A successful attempt has been made to obviate the necessity of making any reference to Pandit Sant Ram Dogra's "Code of Tribal Custom in Kashmir" while dealing with any case pertaining to the applicability and the study of the principles of customary law judicially recognised or otherwise prevalent in any part of the Kashmir Valley. At the same time several chapters on different topics concerning family relations of the inhabitants of the valley have been added and important pieces of legislations regarding succession and marriage have been incorporated as Appendices. The result of my labour is to be found in this volume and I hope that the learned members of the Bar and Bench and all others who may be interested in the very facinating subject of this work will approve of the present edition.

My thanks are due to Shree Soom Nath Zadu, Librarian High Court of Judicature, who has ungrudgingly placed at my disposal every book I required for reference in the course of the preparation of the present edition.

Nila Kanth Ganjoo

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PREFACE

I have tried to arrange the leading topics of Customary Law in a few simply-worded propositions, embodying what is conceived to be rules that are generally accepted by Hindus and Muslims alike, and noting as exceptions, instances where any divergence from these rules have been found to exist. The following chapters are an outcome of the first attempt of this kind in the province, and I hope they may be useful not only as focusing within a narrow compass the present state of Customary Law in this province, but also facilitating any future attempt to codify that law, an ultimate possibility which I regard to be within the domain of luminaries of great knowledge and experience. My object has been to collect and classify the materials for a future code; and while I am fully sensible of the difficulties involved in such an undertaking, and of the shortcomings of the present crude attempt, I have, at least, the consolation to know, in the language of the modern Jurists, "that truth is not advanced merely by the advanced knowledge and expression of it but also by pointing and clearing the way to it, and by firmly settling the questions and problems on the solution of which all success depends. By this means we assist others to attain that end which it may not perhaps be given to ourselves to reach."

It was felt by those best acquainted with the habits and customs of the rural population that neither the *Shara* nor the *Shastras* really exercised any direct influence among them in regard to such matters, and it was also known that the Hindus and Mohommadans, though differing in religion, were often united together in the village community, as it was natural they should be, by the same common rules regulating the devolution and disposal of property which in theory and frequently in practice was recognised as involving a community of interests. Pt. Sant Ram Dogra, Assistant Settlememt Officer, Kashmir, conducted enquiries into *points* of Customary Law, but unfortunately many cases have missed the attention they deserved and no attempt has been made to test their accuracy by comparison with similar cases in other districts effecting the same class of persons. Raja Mohommad Afzal Khan, Revenue Commissioner observed in the case of Lassi versus Rahmati and others, decided on the 11th Jeth, 1995: "I may make it clear to the Revenue Officers that what has been mentioned in the Code of Tribal Custom in Kashmir by Sant Ram Dogra is not to be taken as a gospel truth. The Code contains his observations on the enquiry

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conducted by him, and it has got no sanction of law behind it....." The Customary Law of Kashmir is an unwritten law, and the records commonly known as the Rivaj-i-am are only evidence, the value of which varies considerably. When based on authenticated precedents, the value of such records is great. But where the Settlement Officer, charged with the preparation of such records, has "shaped public opinion on most questions in the direction in which he himself and others of longer experience *thought equitable*", the value of entries purporting to expound local customs is obviously reduced to zero.

Many courts have been placing absolute reliance on the answers laid down by Pandit Sant Ram Dogra in his Code of Tribal Custom, with the result, as might have been expected, that a mass of conflicting decisions have been adopted by the different courts, which instead of defining and consolidating the Customary Law tended much more to render it confused and uncertain.

Savigny very often has been referring to the misused passage of Goethe that "laws are a fatal heritage, which like a disease, trail their curse from age to age." I am fully conscious of the effect of reducing Customary Law to a condition of fixity in a semi-developed state of society which is very likely to hinder the gradually operating innate generation of law by a process of natural development, independent of accident and individual will which best accords with the varying needs and spirits of a people thus circumstanced. All I wish to maintain is the principle that here, as in every other department of law, our object should be so to mould our materials together as to form, at some future period, one harmonious body of law, as well known and as clearly defined as statutory law itself. Occasional divergencies would, of course, have to be provided for in dealing with a law effecting diverse tribes and races. Voltaire only expresses a common place truth when he observes : "that the more vast a state is in size and composed of different peoples, the most difficult it becomes to unite all together by one and the same Jurisprudence."

To make the work as complete as possible, I have incorporated the provisions of those Acts of Legislature applicable to this province which have consolidated certain branches of the civil law, for instance, the Jammu and Kashmir Consolidation Regulation, the Land Alienation Act, the Hindu Inheritance Amendment Act, which may be regarded as first steps towards Provincial Codification. Also I have been *obliged* to refer to the doctrines of Hindu and Mohommadan Laws as in the chapters of Succession, Marriage and Prohibited Degrees in regard to which few or no innovations have been introduced by the custom.

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The work incorporates numerous decisions of the courts in Kashmir on questions such as Succession Alienation, Marriage, Tenure of Land, Adoption and Dukhtari Khana Nashin Some of these decisions have been reported but the greater number are unreported.

After what has been said above, it is hardly necessary to add that the propositions laid down in the following pages are not intended to exclude but rather to aid judicial inquiry in future cases. It is important however, that the *design* and aim of the work should not be misunderstood.

I shall be certainly failing in my duty if I do not acknowledge the help that I have derived in the preparation of this book from the existing work on the subject, especially Rattigan's Digest of Customary Law for the Punjab, Pt. Har Gopal Koul's treatise on the law of adoption prevalent among Kashmiri Pandits of the valley and Mr. Om Prakash's treatise on Customary Law in the Punjab.

In conclusion, I have to express my thanks to Mr. Justice J. N. Wazir who, as the officiating Chief Justice of the High Court, very kindly granted me permission to consult the unpublished record of the High Court of Judicature Kashmir State. I am highly sensible of the great help that I have received from Pt. Amar Nath Kak, Advocate. In spite of his multifarious activities, social, literary and professional, he ungrudgingly undertook to revise the book and offered many valuable suggestions. I can hardly find words to acknowledge the great debt of gratitude he has laid me under. My thanks are due to Pt. Sarvanand Nakaib, Vakil High Court, who has encouraged me to undertake this laborious task and rendered invaluable help in codifying this work. He ungrudgingly placed at my disposal all the manuscript notes of the decisions he had with him. I need hardly add that his help has considerably added to the value it may be deemed to possess. I also desire to express my acknowledgement to Pandit Shyam Lal Sadhu, M. A., Lecturer in English, Sri Pratap College Srinagar for the valuable assistance which he has rendered to me in the compilation of this treatise. My thanks are also due to the Librarian of the High Court Library, Pandit Dina Nath Koul, who always placed at my disposal whichever book I wanted to consult.

Nila Kanth Ganjoo

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Mst- Sakina Begam
& Mst- Sara Begam
Chhalargam & Kumoman

V/s

Mst- Saeeda Bibi of Village
Chhalargam Tehsil Badgam

Revision against an Order
of the Tehsildar Badgam
dated 14/12/1956

The parties in this case are Shea Muslims. On the death of Ali Mir his property in his name has been mutated in the name of his widow Saeeda Bibi by the Tehsildar under his order dated 14/12/1956.

Sakina Begam & Sara Begam sisters of the deceased have come up in revision.

Respondent- Refered judgement of R.M. in Revision No 86 dated 23/9/1952 28/2/2007 which has followed M. C. Khursein V/s Khatoon V/s Ahmadi & Ram Narayan Singh V/s Jamna Kar. I.L.R. 29 Cal 828 P.C

Held that- parties are governed by the personal law, hence appellants entitled to the property of the Ali Mir.

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CUSTOMARY LAW

FOR

THE KASHMIR VALLEY

CHAPTER I.

INTRODUCTION GENERAL

Kashmir customs have their own special features.

CUSTOMARY Law in Kashmir has at present reached a stage when it can no longer be said to be merely stored up in the unexpressed consciousness of the people. It has found expression in external acts, at least upon all the most important topics which concern the practical lawyer, and a remarkable feature of this people's law is, that notwithstanding the heterogeneous composition of the communities which have given it birth, there is very little divergence in the leading principles which underlie it in almost all the different Districts and Tehsils of the valley. It is, therefore, advisable to lay down in the following chapters the leading topics of Customary Law which essentially concern the inhabitants of the valley. It may be observed that the Customary Law as is prevalent in Kashmir at present has got its own special features which distinguish it from the customs prevalent in other states in the Republic of India and Pakistan. Kashmir is geographically situated in the midst of the Himalayas and, as such, some centuries back when the means of communication in the different parts of India were not so developed as they are at present, the inhabitants of the valley could not come into any close contact with those of other provinces in India with the result that the inhabitants of the different Tehsils in the valley have been observing their own customs in almost all the leading topics concerning their every day life. Even the customs as are at present prevalent in the Muzaffarabad District essentially differ from those observed by the inhabitants of the valley. The reason is that the inhabitants of the Muzaffarabad District have greater contact with the people of the Punjab. The language difference is also to a considerable extent responsible for isolating the valley from other states in the Indian Republic and Pakistan in matters concerning the customary rules observed by its inhabitants in their external acts.

There exists a fundamental difference in almost all the important branches of the Customary Law as observed in Kashmir from those observed in other provinces in India. The institution of having a system of Dukhtari Khana Nashin, as has been mentioned in the chapter on "Dukhtari Khana Nashin," is a special feature of the Kashmir customs and is commonly followed by

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almost all the inhabitants of the valley. The following chapters aim at pointing out in detail all these divergencies and to put in a nutshell that branch of law which now no longer exists in the unexpressed consciousness of the people but has found expression in their external acts as well.

What is a Custom ?

A custom is a particular rule which had existed either actually or presumatively from times immemorial, and thus obtained the force of law in a particular locality although contrary to and not inconsistant with the general common law of the realm. Custom is quite different from fashion, manner, and practice. It is authoritative and stands in the place of law. It regulates the conduct of men in the most important concerns of life. *Fashion* is arbitrary and capricious, it decides in matters of trifling import. *Manners* are rational ; they are the expressions of moral feelings *Customs* have most force in a simple state of society ; *fashions* rule most where luxury has made the greatest progress ; *manners* are most distinguishable in a civilized state of society, *customs* are in their nature as unchangeable as *fashions* are variable ; *manners* depend on cultivation and collateral circumstances, *customs* die away or are abolished ; *fashions* pass away, and new ones take their place ; *manners* are altered either for the better or the worse.

Custom and habit.

Custom is a frequent repetition for the same act, habit the effect of such repetition. Custom supposes an act of the will, habit implies an involuntry movement; a custom is followed ; a habit is acquired. Custom is applicable to bodies of men, habit is confind to the individual ; every nation has customs peculiar to itself ; and every individual has habits peculiar to his age, station and circumstances.

Custom and Practice.

A practice may be defind as frequent or unfrequent regular a irregular, act performed habitually, but a custom does not require to be qualified by any such epithets, it may be the practice of a person to do acts of charity, as the accasion requires, but, when he uniformly does a particular act of charity at any given period of the year, it is propely denominated his custom.

Both practice and custom are general or particular, the former is obsolute, the latter relative; a practice may be adopted by a number of persons without reference to each other; but a custom is always followed either by imitation or prescription : the practice of gaming has always been followed by the vicious part of society, but it is to be hoped for the honour of man that it will never become a custom.

Custom prescription and usage.

Custom differs from prescription and usage, in as much as, a custom is a law established by long usage and differs from prescription in the fact that prescription is the making of a right

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while custom is the making of the law.

A usage in its most extensive meaning includes both custom and prescription; but in its narrower signification it refers to a general habit ; mode or course of procedure. The words "custom" and "usage" are not synonymous. A usage need not possess the same degree of antiquity as a custom. Usage should never be used as synonym for custom. It has two distinct legitimate meanings but neither of them should be confused with custom. It is used to denote what is done by people uniformly and consistently. Used in this sense usage has not the force of law. It would only obtain the force of law when it is proved to be reasonable, invariable, ancient, etc., in which case it becomes what is known as custom. It is also used to denote what is done uniformly and has been so done in a certain locality or by a certain trade or profession, etc., for a period sufficient to make it probable that people in their contract and in their contractual relationships adopt it as an implied term or condition.

Immemorial customs & Local usages distinguished.

Immemorial local customs are clearly distinguishable from particular trade or local usage, although in practice they are frequently confused with them. They lack three of the distinguishing features of custom properly so called. First they need not have existed from time immemorial.‡ In the second place, they need not necessarily be confined to a limited locality. In the third place, usages, however extensive, if contrary to positive law will not be sanctioned by the court, while customs may be inconsistent with the general law of the realm. "We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle."¶

What is Customary Law ?

"Usage, or rather the spontaneous evolution by the popular mind of rules the existence and general acceptance of which is proved by their customary observance is no doubt the oldest form of law making. It marks the transition between morality and law. Morality plus a state organisation enforcing the observance of certain parts of it is Customary Law †

"Customary law (*mores majorum*) is according to Justinian *jus non scriptum*. It is composed of a large body of rules obser-

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‡ Vide Dalgish versus Gujuffer, 23c. 427,3.

¶ Halsbury's Laws of England vol x page 221 ; per Cockburn C. J. in Goodwin versus Roberts.

† Holland's Jurisprudence.

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ved by communities, evidenced by long usage and founded on pre-existing rules sanctioned by the will of the community. It exists independently of a sovereign authority and forms the ground work of every system of legislation."* It is according to Salmond any rule of action which is actually observed by men.

Definition of Law must include a custom.

Austin's definition of 'law' altogether excludes a large body of rules and customs collectively termed unwritten laws or *jus non scriptum* which existed and regulated the conduct of human societies long before any regular political or civil government came into existence. "A law," says Austin, "in the most general and comprehensive acceptation in which the term in its literal meaning is employed must be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." This definition of law is, apparently, defective in as much as the very basis of the entire legal system is excluded outright. Customary law is the ground work of every legal system and the doctrine that the term 'law' does not include a large body of customs cannot be accepted safely. To say, therefore, that customs and usage which have all the force of law and some times even greater force than statutory law are not to be laws, is a mere verbal contest and nothing else. According to Salmond law consists of a body of principles recognised and applied by the state for the administration of justice. This definition is also fundamentally defective. Law, according to this definition is only a body of principles or a body of rules. But the term 'law' includes something more than a mere body of rules and principles. A definition must include all what the term 'law' purports to relate to, namely, all the body of customs having a binding force and the statutory laws promulgated by sovereign bodies competent to do so. According to Roscoepound law consists of a body of rules, principles, conceptions, standards, received ideals and technique of using them established or recognised by organised human society for the delimitation and securing of interests. While Roy defines law as a body of rules of human conduct either prescribed by long established usage and customs or laid down by a paramount political power. These two definitions may be considered to be rather appropriate.

Main's view of the spontaneous development of law:

Main distinguishes three stages in the development of law. The earliest is when law is not conceived as principle enunciated for general applications or observance but as a judgement announced to determine a particular issue by a king or priest acting under divine inspiration. The most notable examples of this are the *Themistes* in the Homeric poems. The only authoritative statement of right or wrong in this stage is a judicial pronouncement uttered after the occurance.

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* Mr Roy's Customs and Customary law in British India page 10.

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The next stage is when the notion of custom is established. The custom is affirmed by a judgement and the breach of it is punished. The divinely inspired king or priest is superseded by aristocracies or small privileged groups who become the depositories and administrators of law without claiming divine inspiration for each pronouncement. These aristocracies monopolised all knowledge of the law. This is the stage of true customary law. It existed before the invention of writing, at a time when the only chance of preserving the customs in a traditional form was to confide them to the care of a privileged order or cast.

Two question are much debated with reference to usage. First as to the mode of its growth as usage, secondly as to its transformation into law.

Growth.

Its chief characteristic is that it is a generally observed course of conduct. No one was ever consciously present at the commencement of such a course of conduct, but we can hardly doubt that it originated generally in the conscious choice of the more convenient of two acts though sometimes doubtless in the accidental adoption of one of two indifferent alternatives ; the choice in either case having been either deliberately or accidentally repeated till it ripened into habit.† "It is impossible to ascertain the precise beginning or to discover the rudimentary growth of an ancient and long established custom. It is of such high antiquity that neither human memory nor historical research can retrace it. Indeed on its antiquity and immemorial practice depends the goodness of a custom. But though we are unable to trace the origin of a custom which is shrouded in the mist of ages, yet we can ascertain the process by which a certain rule of conduct is gradualy established into a custom." Observes Mr. Roy in his treatise on the Customs and Customary Law in British India.

A rule of conduct, by uniform series of acts in pursuance of it turns into a custom, which the people observe and follow without any coercion from any body. The rule or rules come into existence without any apparent author. Their birth and growth is the natural consequence of the progress of human society.

Illustration of how usage formed.

The mode in which a path is formed across a common is the best illustration to explain the formation of a habitual course of action, resulting in a usage. One man crosses the common, in the direction which is suggested either by the purpose he has in view, or by mere accident. If others follow in the same tract which they are likely to do after it has once been trodden, a path is made.

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† Holland's Jurisprudence page 32.

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Sir Henery Maine is of opinion that the germ of customary law is to be found in the *Patria Potestas*, or the absolute and arbitrary orders of the head of the family to those immediately under him. "These are in the history of law certain epochs which appear to us, with such knowledge as we possess, to mark the beginning of distinct trains of legal ideas and distinct course of practice. One of these is the formation of the *Patriarchal* family, a group of men, women, children and slaves, of animate and inanimate property, all connected together by common subjection to the *Paternal Power* of the chief of the household.....A great part of the legal ideas of civilised races may be traced to this conception and the history of their development is the history of its slow unwinding."*

Savigny's view :

Savigny tells us that the growth of law has no dependence upon individual arbitrary will or accident. It is begotten in the people by the popular intelligence. The 'people', however, has no actual existence apart from its bodily form, the State. Law has its existence in the general will ; customary observance is not the cause of law, but the evidence of its existence. It does not make its first appearance in the form of logical rules. Or, going still further afield, we are told by Hegal to see in the rise of law the evolution of the *Deity*.

Transformation of custom into law :

Writes Austin : "At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted by the courts of justice and when the judicial decisions fashioned upon it are enforced by the power of the State. But before it is adopted by the courts and clothed with the legal sanction it is merely a rule of *positive morality*". Thus according to Austin customary law embraces only those customs which have been recognised by the established tribunals. He holds customary law as *'positive law fashioned by judicial legislation upon pre-existing customs'*. The inconsistency of this view is quite apparent. Firstly Austin excludes a large body of customs which exist with all the forces of law, just like those which as a matter of accident have been brought before the court to receive judicial recognition. Secondly, Austin holds that the moment a particular custom receives judicial authentication it becomes part and parcel of positive law and, therefore, to call this positive law again a customary law is simply to confuse oneself if not to make a contradictory statement altogether.

Allen's view.

Opposed to the view of Austin is the view of C. K. Allen who says : "If a custom is proved in an English Court by satis-

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* Refer Maine's Ancient Law.

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factory evidence to exist and to be observed, the function of the court is merely to recognise the custom as operative law". He contends that customary law is quite independent of the court whose function is merely to see that there is an existing custom not inconsistent with positive law and if this condition is fulfilled to enforce it. In his view all the test of the so called validity of a custom with the exception of the first two (viz. reasonableness and its conformity with a statute law and other customs) are evidential and are only required in order to show that the custom exists in fact. These two tests (reasonableness and conformity with statute law and other customs) assure that the customary law shall not conflict with public policy (reasonableness) or positive legality and the burden of proving that a custom which is shown to exist in fact does not conflict with *reason* or *law* lies upon the person approving the validity of the custom in exactly the same way as it lies on a person approving a *bye law.*

Thus according to Allen a custom is law quite independent of the law courts and even before it receives the stamp of judicial authentication which is the characteristic feature of only some of the customs that have accidentally been brought before the court for a legal recognition. Allen's view is based upon the view of Holland who says: "English courts require not only that a custom shall be proved to exist but also that it is reasonable and the legislature often abrogates customs partially or wholesale."

Holland's view.

Holland writes: "The State through its delegates, the judges, undoubtedly grants recognition as law to such customs as come up to a certain standard of general reception and usefulness. To these customs courts give operation not merely prospectively but also retrospectively, employing thereby that custom was law before it received the *stamp of judicial authentication.* The contrary view supported by Austin is at variance with facts. The element of truth in his view which he had done good service by bringing into prominence is that usages though it may make rules cannot make law without obtaining for them the recognition of the State. The element of mistake in his view is to date the State recognition from the moment that the usage has been called in question and allowed to be good in a court of justice.

"When a given set of circumstances is brought before a court of law, and the court decides upon them by bringing them within the operation of a custom the court appeals to that custom as it might to any other pre-existing law. It does not then for the first time make that custom a law. It merely decides as a fact that there exists a legal custom about which there might upto that moment have been some question, as there might be about the interpretation of an Act of Parliament It then applies the

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custom to the circumstances of a case just as it might have applied an Act of Parliament to them. A good custom or an intelligible Act of Parliament either exists or does not exist objectively before the case comes into court although it is from the decision of the court in the particular case that a subjective knowledge is first possible for the people of the existence or non-existence of the alleged custom or that this or that is the meaning of the Act of Parliament." *

Custom how preserved.

Man being entirely conservative by nature has not allowed to pass into oblivion customs even from the remotest ages. Each member of a community looks upon these customs handed down to him from his ancestors with a great reverential regard. To isolate a custom is to him nothing short of a sacrilege. Therefore, we are in a position to say that by right observance and constant practices the traditional rules have been always kept in evidence and transmitted from generation to generation without any way being wrapped by extraneous influences. Further the perpetual discussion of customary law by the people themselves have tended greatly towards their preservation.

"The preservation," says Sir Henery Maine, "during a number of centuries which it would be vain to calculate, of this great body of unwritten custom differing locally in detail but connected by common general features is a phenomenon which the jurist must not pass over. Before I say anything of the conclusion at which it points, let me tell you what is known of the agencies by which it has been preserved.....One great instrumentality is the *perpetual discussion* of customary law by the people themselves.....But the smaller organic groups of Indian society are very differently situated. They are constantly dwelling on traditions of a certain sort, they are so constituted that one man's interests and impressions correct those of another and some of them have in their council of elders a permanent machinery for declaring traditional usages, and solving doubtful points."

Holland writes: "A habitual course of action once formed gathers strength and sanctity every year. It is a course of action which every one is accustomed to see followed: it is generally believed to be salutary, and any deviation from it is felt to be abnormal, immoral. It has never been enjoined by the organised authority of the state, but it has been unquestionably obeyed by the individuals of which the state is composed."

Custom very ancient and far earlier in origin than law.

Of the two, custom and law, custom is admittedly of far earlier origin than law. Law which is the product of a rather complicated machinery of social and political organisation was

* Holland's Jurisprudence.

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unknown, at any rate, in its present sense, in the primitive ages when society was not as at present a collection of individuals but an aggregation of families. There was no king or sovereign to frame rules or set 'law' for these families. One family was independent of another and followed its own head, whose will or pleasure was 'law' unto its own members. As families expanded into a community and community into a tribe, rules and principles were established for the guidance of its members and for the regulation of its internal economy. They continued for ages and existed long before any attempt to legislate was made by a sovereign authority, and having been handed down from generation, came to be regarded as sacred traditions and customs governing the tribe.

In tracing the gradual development of law, one sees how custom has been the very corner stone of the legal super-structure. It has been so in every country, ancient or modern. The Roman Law which, theoretically rests on the twelve *decemviral tables* and, therefore, on basis of written laws was in the words of Sir Henery Maine "merely an enunciation in words of the existing customs of the Roman people." Savigny remarked that the oldest law in Rome as among all nations was founded on the common understanding and consent of the people without any apparent basis and this we are accustomed to call *Consuetudinary law.**

Legal authority of a custom :

"After the organisation of states, many of the customary rules of society still continued to be recognised, and acquired a further sanction. They had previously been enforced only by popular opinion, or by the licensed revenge of injured parties. They were now enforced by the political authority. They became law ; and were doubtless for the time the only laws known. They were the unwritten, but well known opinions of the community as to social rights and wrongs. It will be more correct to say that written law was an imitation of custom."†

Special importance of customary law :

In his book "Custom and Customary law in British India." Mr. Roy writes : "Government by legislation in the modern sense of the expression is of a very recent date." The Hindu Rajas did not make a serious attempt to govern their people by legislation but left them to mould their own customs regading marriage, adoption, succession etc. The people settled all the cases according to their old customs and traditions sanctified by the practice of their forefathers. The importance of customary law, so far as India is concerned, is very great indeed, in as much as the British Government at the commencement of their ascendency in this country assured to its inhabitants full enjoyment of their

* Roy's "Custom and Customary Law for British India" page 10.

† Holland's Jurisprudence.

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laws and customs. Apart from this, section 15 of the Indian Regulation IV of 1793 shows that the customs and usages of this country were early recognised and all the British courts were required, in determining questions of civil rights and status in cases between Indians, to decide according to such customs and usages. This statute provided that in suits regarding inheritance and succession to lands, rents and goods, marriage caste and all other matters of contract and dealing between party and party, the laws and usages of Hindus, in the case of Hindus, the laws and usages of Mohomadans, in the case of Mohomadans should be observed by the judges in coming to a final decision. Shortly after the Judicial Committee in its decision in Ramnad case solemnly declared that "under the Hindu system of law clear proof of usage would outweigh the written text." (Collector of Madura Mootoo versus Rama Linga 12 M. I. A. 436.)

Amongst the Hindus even the Brahamnical writers have acknowledged in the strongest terms the binding force of a custom. Manu says that "immemorial usage is transcendant law" and that "holy sages, well knowing that law is grounded on immemorial custom, embraced as the root of all piety good usages long established." He further says. "What has been practiced by good men and by virtuous Brahmans, if it be not inconsistent with the legal customs of provinces or districts of classes or families, let him establish." Yajnavalkya says:- "Of a newly subjugated territory, the monarch shall preserve the social and religious usages, also the judicial system, and the state of classes, as they already obtained."

With a desire to safeguard the application of customs and usages which were continuous, uniform, reasonable and not immoral nor opposed to public policy saving clauses were introduced in different legislations made by legislatures of different Indian provinces so that the judges might give full effect to these customs in deciding cases pending before them. In Section 5 of the Punjab Laws Act IV of 1872 and the North Western Frontier Regulation VII of 1901 provide that in questions regarding succession, betrothal marriage, divorce, dower, guardianship, minority, bastardy, family relations, wills, lagacies, gifts, partitions, or any other religious usage or institution the first rule of decision would be any custom applicable to the parties concerned, which would not be contrary to justice, equity or good conscience and would not by any enactment be altered or abolished etc. Likewise section 4 of the J. & K. Sri Pratap Consolidation Regulation of 1872 provides that in all matters concerning succession, inheritance, special property of females, divorce, dower, adoption, guardianship, minority, bastardy, family relations, castes or religious usages or institutions the first rule of decision in Kashmir is the personal law of the parties excepting in so far as the parties allege and prove that their personal law in matters of succession etc. has

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been modified by any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience or has not been declared void by any competent authority or has not been altered or abolished by any enactment so far. Customary law is, therefore, the basis of decision in only those matters to which the personal law of the parties may be applicable, viz. those relating to family relations when such personal law has been modified by a particular custom applicable to the case. It is in order to ensure uniformity in the application of law in the matters of punishments, awards of claims etc., and on grounds of public policy that other branches of customary law cannot be safely enforced.

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CHAPTER II

INTRODUCTION PARTICULAR

The Past.

THE origin of Kashmir is lost in its antiquity and human curiosity has had to find in mythology an explanation for its pre-historic existence. The subsequent history of this ancient territory follows the pattern of other Indian Principalities of the times. It came successively under the influence of Budhism, Shaivism, orthodox Hinduism and Islam. It underwent periods of persecution such as other states have seldom seen. It enjoyed services of wise ministers who placed at the disposal of the state their massive judgment, sound commonsense, capacity for efficient administration and supreme regrad for the welfare of the people. In between these periods of beneficient rule are interposed periods when which-crafts apeared to have brought about the life and death of individuals, where the nation groaned under persecution and tyranny, where people were subjected to the whims, caprices and intrigues of petti-coat governments and where changes in rulership were brought about with statling frequency.

Despite such a chequered history, have survived relics and institutions which bear witness to the culture, heritage, the intelligence and the foresight of the previous ages. The temples of Jyeshthe'svara and Shankracharya, the embankment from Dalgate to the city separating Chinar Bagh from Dal Lake, the shrine of Martand, the relics of Avantipura, the achievements of Suryya, some of the existing industries and crafts, villages like Zenagir, Zenapore, bridges like Zanakadal, pleasure resorts like the gardans of Shalimar and Nishat are tributes to the genius and statesmanship of rulers like Gopaditya. Parawarsena, Laltaditya, Awantivarman, Zian-ul-Abadin, Jehangir and Shah Jehan. Similarly the land revenue system of Shamas-ud-Din and Akbar and the impetus to trade and learning given by Zain-ul-Abadin form some of the bright achievements of non-Hindu rulers of the then kingdoms. It must be said to the eternal credit and as a tribute to the greatness, wisdom and prudence of Zain-ul-Abdin that under his rule learning and scholarship thrived irrespective of race and religion, appointments went without favour to any particular community, the inequitous burden of *jaziya* was abolished and the state returned after years of unrelieved oppression, to a golden age which lasted for fifty years. Such prosperity or enlightened rule had not been witnessed in this state for seven hundred years after Lalta-ditya whose periods in several respects could well be compared with the reign of Zain-ul-Abdin.

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These glimpses into the past serve to bring out the ancient heritage which the present generation of Kashmiris has continued to enjoy despite the flunctuations in their prosperity and the upheavals in their political development. After the death of Aurangzeb, however, the country relapsed into a long period of unsettled condition in which it witnessed brutal tyranny and cruel anarchy under the Afghans, insufficiently redeemed by few constructive measures. The initial reign of the Sikh Governors presented no different picture. To these evils were added the cholara epidemic of 1827 and the famine, flood and earthquake of 1831, which brought dissolution and ruin to the whole country side.

Maharaja Gulab Singh became the Raja of Jammu in the year 1819. He conquered Ladakh and Baltistan between the year 1835 and 1840 and finally for the service rendered by him to the British in the negotiations culminating in the Treaty of Lahore of 1846 he secured for himself happy valley of Kashmir subject to the payment of 75 lacs of rupees to the British Government. Gulab Singh was succeeded by his son Maharaja Runbir Singh who ruled the state of Jammu and Kashmir for 28 years. He was succeeded by Maharaja Pratap Singh whose reign lasted between 1885 to 1927. Maharaja Hari Singh was installed as the Ruler in tbe year 1926. The construction of the Benihal Cart Road, the Veir in Srinagar, power generating stations in Mohora and Jammu are some of the noteworthy achievements of a century of Dogra Rule in Kashmir. But during their reign class prejudices, provincial discrimination, favouritism and nepotism were rampant which indicated the political indiscrimination of the Dogra Rulers. The state has now acceded to the Republic of India and has thus become its integral part. At the helmn of affairs of the State administration is a People's Government guiding the destinies of the people for the last over a decade now. A substantial progress towards the development of the country has been achieved during this decade–construction of the Jawahar tunnel being the most noteable projects which has been undertaken and completed by the People's Government in the State.

There are four principal religious communities inhabiting the valley—Hindus, Muslims, Sikhs and Budhists. The Christians and Zoroastrians, though not completely absent, constitute a very small proportion of the State population. The Hindus of the valley worship *Shiva* as well as *Vishnu*, and the Mohommadans living in the valley are either 'Sunnis' (locally called Mussalmans) or 'Shias'.

Hindus: The Hindu population of the valley with the exception of a handful of immigrants in the town, are *Sarasvat Brahmins* by caste and are generally known as Kashmiri Pandits. As regards the origin of Kashmiri Pandit Brahmans, it is certain that it was

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a colony of Aryan immigrants from Central Asia.¶ Their features and fair complexion bespeak them of their inner Aryan race. Sir Monier Williams in his book *"Modern India and the Indians"* at page 151 writes that the Kashmiri Pandits are among the finest types of the Aryan race. Mr. Thompson writes in his *History of India* that the Aryans were a long-headed race of tall stature with narrow noses and fair complexion. Their purest representatives are found today mainly in Kashmir. Likewise Mr. George Campbell in his book *"Ethnology of India"* says that the Kashmiri Brahmins are quite High-Aryan in the type of their features-very fair and handsome, with high chiselled features, and no trace of intermixture of the blood of any lower race. Most of the Kashmiri Pandits reside in the city of Srinagar and are descended from the indigenous population of the country There history goes back to very early times. A large number of these Kashmiri Pandits have migarted to India during past centuries and have been domiciled there. There is a passage in *"Aini Akbari"* regarding Kashmiri Pandits which runs as follows :—

"The most respectable class in this country (Kashmir) is that of the Pandits, who notwithstanding their need for freedom from the bonds of tradition and custom are the true worshipers of God. They do not loosen their tongue of calumny against those not of their faith nor beg nor importune. They employ themselves in planting fruit trees and are generally a source of benefit to the people."

The Kashmiri Brahmins are divided into 122 exagamous sections (*Gotras*) the members of which profess to be descended from the *Risi* or inspired Saint whose name the *Gotra* bears. Among these sub-divisions social precedence is governed by the spiritual greatness or the inferiority of the respective *Risi*; 'Kaul' being considered the highest of all the sub-divisions. But generally social position is determined by the nature of occupation followed rather than by the *Gotra* and those who have been employed in superior state service since two or three generations hold their heads high above those who are engaged in trade or cultivation.

Gotra:

Brahmanical legend and theory : The Brahmans all pride themselves on their divine origin. Legend relates that once, when Brahama was performing a sacrifice, there came forth from it the seven *Risis*—Bhrign, Angiras, Marichi, Atri, Paulaha, Pulastya and Vasistha. The Brahmanical septs were likewise supposed to derive their origin from seven *Risis*, though not exactly the seven just named of whom the fifth, Paulaha, brought forth demons (*Raksasas*), and the sixth, Pulastya, devils (*Pisachas*), while the seventh, Vasistha, died and appeared again as a descendant of Marichi. Then, as Bhrign and Angiras, owing to their mythical character,

¶ See Rajatarangi 1, 34.

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could not properly be represented as founders of families, their place is taken in the Brahmanical theory by other three ancestors, Bhrign being superseded by Jamadagni, and Angiras by Gautama and Bharadvaja. In the *Satapatha Brahmana*, accordingly, the seven *Risis* enumerated as ancestors are: Gautama, Bharadvaja, Visvamitra, Jamadagni, Vasistha, Kasyapa and Atri To these traditions add an eighth, Agastya; and thus the Brahmanical clans (*Gotras*) are in reality traced to eight ancestors. These rank as *Gotrakarins*—the founders of the numerous Brahmanical families, and their descendants are the various *Gotras*.

Origin of Gotra

The sociological sense of the term *Gotra* has been derived from the vedic usage ('cow-stall') as follows: In ancient times Indian family, even when—in consequence of its numerical increase –its property had been greatly sub-divided, would still continue to use and occupy jointly the land reserved for grazing cattle; and we may, therefore, conclude, it is said, that the Brahmanical *Gotra* was in its origin simply a community of this kind i.e. a family whose members enjoyed joint rights in a particular pasturage.‡ But this hypothesis does not in any degree account for the most characteristic features of the *Gotra*, which in fact, can be explained only by comparison with the *gots* of the aboriginal tribes in India.

The prohibition of marriage within ones own *Gotra* had manifestly become the rule by the time of the *Dharmasutras*. In the Code of Manu we find that a maiden who is not related by blood on her mother's side, and does not belong to the same *Gotra* on her father's, is recommended to the twice born as eligible for marriage and the community of the household ceremonies. *Apastamba* forbids a father to give his daughter to a man of the same *Gotra* as himself, while Gautama and Vasistha permit marriage only between those who have not the same *Pravara*.

Gotras in India at the present day

Just as the system of caste, in its main feature (endogamy and hereditary calling) survives unchanged to the present day, so the state of things in relation to *Gotra* is among the Brahmans at least, the same today as it was in ancient times. The Brahmanical *Gotras* are still eponymous sections named after the vedic *Risis*, and each section is exogamous. Among the Brahmans, as in the inferior castes, blood relationship is traced in the male line, and carefully constructed tables of the degrees of relationship have been prepared for the purpose of guarding against prohibited unions, while evidence is adduced at marriage to show that bride and bridegroom are not related within forbidden degrees. It is obvious that the observance of the religious ceremonies in

‡ G. Sarkar's Hindu law, page 50.

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which the Brahman was required to pronounce the name of his ancestors must have tended to keep the *Gotra* system essentially unchanged; as every Brahman repeats his *Pravara* three times a day at morning, noon, and evening prayer, the fact of his belonging to a certain *Gotra* is constantly kept before him. How far the prohibitions of marriage which are based upon *Gotra* and *pravara* are still observed among Brahmins would seem, however, to be largely a matter of local distinctions.

Number of Gotras.

To fix the number of *Gotras* at eighteen, as is done by a modern Hindu writer,† cannot be considered as other than a hypothesis based upon Brahmanical legends. The writer in question holds that the original eight families of *Gotrakarins* were supplemented by ten more and that the latter consisted of Brahmans who had for a time followed the vocation of *Ksatriyas*, and had become Brahmans again, regading themselves as descended either from Bhrign or from Angiras. They rank as *Kevala Bhargavas* or *Kevala Angirasas*‡ and may intermarry with any other family. Their names are:- Vitahavaya, Mitrayu, Sunaka, Vena, Rathitara, Mudgala, Visnu, Vriddha, Harita, Kanva and Sankriti.

The number of families descended from these *Gotras* is far from constant. According to Asvalayana, the total is forty nine. In a passage quoted by Radhakanta the number is given as twenty four and so on.

The following extract from the 'Census Report' of Kashmir of the year 1911 may also be quoted here for rerfeence :-

Dattatraya, Bhardwaj, Mudgali Paldeva:

"The popular tradition is that Brahmans of Kashmir are in the direct line of descent from Kashap. They are divided into 133 *Gotras*, named after the divine sages or ascetics by whom their classes are represented, though as a matter of fact, the original *Gotras* did not exceed six, as noted in the margin, the remaining 127 *Gotras* being due to intermarriage or intermixture with other Brahmans. Some authorities give the principal divisions as only three, viz. Bhat, Pandit and Razdan from which are derived the distinctive appelations of Koul, Sopori, Pandit, and Raina. The Koul Gotra is *Dattatreya*, the Sopori Pandit, *Paldeva*, *Vasgargy*, and the Razdan (Raina) (1) *Kantha Dumayon*, and (2) *Saman Mudgaly* From these three families gradully, as each took to a distinct and particular trade, or occupation or by adoption and intermarriage further Gotras came into existence and new castes were formed. According to another authority, the parent

† Chentsal Rao in The Principle of Gotra.

‡ Kevala equal to Separate, isolated.

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stock is represented by three brothers, Kayitachari, Mummatachari and Ubbatachari. History further records that between the year 1435 and 1442 A. D., consequent on the slaughter by Mohommadan conqueror of all but eleven families of Pandits, excepting those who managed to escape from the country, those left behind assumed the tribal distinction of *'Malmas'* while those subsequently returned from the flight were called *'Banamasis'*. These two surnames have, however, reference to the astrological calendar observed by the two races, *'Malmas'* meaning the lunar and the *'Banamas'* the solar months of the year, and it is difficult under the circumstances to regard these as race distinction, unless the new settlers into the valley after the wholesale slaughter of 1435 A. D. observed the solar months as contradistinguished from the aborigines whose calculations were based on the phases of the moon. This account may be taken for what it is worth, but there could be no doubt that the above distinctions did not interfere with intermarriage or social position till the reign of Zain - ul - abdin, when the withdrawal of interdiction against employment of Hindus in the State, encouraged the study of Persian and enabled the Brahmans to aspire to high office in the administration. It was then that they divided off into two parties known as *Karkun* and *Bachabat*, the former forming the laity and the latter the priest-hood. To enable this arrangement to be carried out, as all were equally Brahmans of the same status, the *Karkuns* made their daughter's sons their Bachabats. Later on, such of the *Karkuns* as relinquished the study of Persian and took to Sanskrit literature, began to be called "Pandits" but were not for that particular reason, estranged from their fraternity. Among the *Karkuns* there is a class known as *Bhattaraks* who are said to be descended from royal blood and the *Razdaniks* from the nobility.

"The Karkuns strictly refrain from *Dan* * and do not, as a rule, take a wife from the Bachabats; in all other respects irrespective of *Gotra*, clan, caste or sub-division, they observe the same customs, religious rites and are otherwise on perfect equality with one another. If any of them commit himself or take a lowering occupation, he is called *Dagi* (or stained), but does not forfeit any of his caste privileges. Trade and agriculture are looked upon as low, but this idea is gradually losing ground. All Kashmiri Brahmans conduct their funeral and religious ceremonies according to *Nilmat Puran* and according to the Vedas of Logak Rishi. The Kashmiri Pandits are mostly Shaktikas or Tantrikas, their favourite godesses being the *Khir Bhawani* and *Jawala Mukhi*, but they are also known as Shivas and Vishnavas. They unscrupulously eat food cooked in boat rowed by Mohommadan Boatman, employ Mohommadans as water bearers, and invariably wear a white turban on their heads."

* 'Dan' means receiving charity.

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Census report not accurate.

It may be observed that the information given in the Census Report in the para quoted above is at many places very misleading. For instance it is mentioned at the very beginning of the opening para that the Brahmans of Kashmir are in a direct line of descent from Kashapa. This is a very sweeping remark which is not corroborated by any historical fact. Each and every Kashmiri Brahman traces his descent from a particular *Risi* or inspired saint whose name they bear as their own *Gotra*. Kashapa was one of the *Risis* who made the valley habitable and the Kashmiri Brahmans do not believe to have descended from him. The report also mentions that Kashmiri Brahmans conduct their funeral and religious ceremonies according to *Nilmat Puran* and according to the vedas of *Logak Rishi*. As has been specified by Dr. Bhullar in his report on Sanskrit Manuscript of India Journal 1877, various rites performed by Kashmiri Brahmans are according to *Charania Kathaka School*. The *Sutras* of *Laugaksha* recently published by the Kashmir Research Department follow this school and all rites of birth and cremation etc. are performed according to those. *Nilmat Puran* contains only worships which are concourse of various forms of religions existing in Kashmir in prehistoric ages as well as orthodox Brahmanical systems, many of which are worship of aborigines e.g., the worship of *Pichachhas* etc. Likewise the census report contains a remark that in the reign of Zain-ul-abdin with the withdrawal of restictions against employment of the Hindus several Brahmans took to the study of Persion solely with a desire to find suitable positions in the administrative machinery of the State. It was then that they divided into two parties called *Karkuns* and *Bachabat* the former forming the laity and the latter the preisthood and so on. This is an inaccurate and incomplete account of how the formation of these two classes actually underwent. Mr. Justice Jia Lal Kilam in his learned book "A History of Kashmiri Pandits" has dwelt on this matter with a remarkable analytical and historical approach and has in the chapter entitled "The Pandit Reborn" at pages 52 and 53 of his book discussed n detail how these two classes came into existence. It will be of interest to reproduce below a paragraph contained in the chapter in extenso with apologies from the great author of the book.

"Shri Bhatta's selflessness and the acceptance of his request by the king proved a land-mark in the history of Hinduism in Kashmir. Shri Bhatta's attitude shows that the will to live as a group by themselves was very predominent amongst the Brahmans which was shared by Shri Bhatta in an equal measure with the whole lot of them. Freed from the shackles of *Jazia* and other handicaps the Brahmans started their own reorganization and rehabilitation. By now the Persian had become the official language. The desire to share office with others could not be fulfilled without a study of Persian. The Brahmans who were popularly known as *Bhattas* took to the study of Persian and in a brief span

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of a few years they acquired a mastery over this language. But the Sanskrit learning and their religious ceremonies were not forgotten because this was the only distinctive feature to keep them alive as a separate group. There was not practically only one caste, that of the Brahmans which represented Hinduism in Kashmir. From this did now "Lords Spiritual and Temporal" again take their birth, just as in the past the Lords Spiritual and Temporal sprang out of the *vis* (populace.) The caste was divided further into two sub-castes, the Karkuns and the Bhasha Bhatta or Bhacha Bhat, the former included amongst its fold those who studied Persian and entered Government service and the latter those who studied Bhasha, i. e., Sanskrit and took charge of the religious affairs of the community. But how was the division of labour to be made ? It was decided that a daughter's son of a person should be made a Bhasha Bhatta to administer to the religious needs of his maternal grandfather's family. The arrangement was simple enough as it began involving no loss of status to the Bhasha Bhatta, but in course of time this arrangement became responsible for the creation of two distinct classes with a distinctive culture and mode of life and habits with the result that though there is no legal or religious bar, yet the two classes seldom inter-marry these days. In the beginning the Bhasha Bhattas prided at having been given the exalted position of the custodian of the religion and learning of the country and may be that they were looked at with great esteem and regard by the Karkuns. But for his maintenance the Bhasha Bhatta was dependent upon the Karkuns. In course of time they lost their importance. The rise and fall of the Karkun made a corresponding increase or decrease in Basha Bhatta's economic position. Gradually the majority of the Bhasha Bhatta's became like the parts of a soul-less machine destined to perform ceremonies in a mechanical manner in lieu of a pittance they eked out of the munificence of the Karkun, but some of them maintained their highest traditions, and their fame for great learning and culture resounded from one end to the other. But socially, because of their economic dependence upon them, they in course of time came to be looked down by the Karkuns. Thus the Kashmiri Pandit took his birth in his modern shape, though till then the name Kashmiri Pandit was not coined to describe this community which was described as Bhatta. Even now a Kashmiri Pandit at home describes himself as a Bhatta and it is by this name that he is described by others in Kashmir."

It has been made clear that every Kashmiri Pandit family in Kashmir or outside Kashmir is either a *Malmasi* or a *Banamasi* and the members of each family claim descent from different *Gotrakarins*, the founders of the numerous Brahaminical families, which are their *Gotras*. *Malmasis*, as will be found by reference to the extract of Census Report of the year 1911 cited on page

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16 *Supra*, are those who did not leave their country consequent on the slaughter by a Mohommadan conqueror of all but eleven families of Kashmiri Pandits ; while *Banamasis*, popularly known as *Bahar se Aye huey*, are those who returned from the flight later when better conditions were restored. An extract from *Kashap Krit Gotra Adhaya* is cited below in a tabulated form showing the *Gotras* of the different families of Kashmiri Pandits and also whether they are *Malmasis or Banamasis* :-

Name of the *Gotra*.	Malmasi or Banamasi.	Names of the Families included in the *Gotra*.
1. Bawakapushtal भवा कपष्टल	Banamasi भा० मा०	Nadu, Kalla, Sabane, Laddu, Chur, Chudhri, Wangun, Wante, Katu, Geeru, Shev, Sakeem, नाडु, कल्ला, साबिन, लड्डु, चूर, चूदर, वांगुन, वांट, कटु, गेरु, शेव, सकीम,
2 Bawakapushtal Wupmaney भवा कपष्टल उपमन्ये	do	Kharu. खरु
3 Swamin Dass Logakhshi स्वामिन दास लोगाक्ष	do	Chhot. छोट
4. Kantha Dumayan कण्ठ धौम्यायन	do	Kaw, Brayt. काव, ब्रेठ
5. Dhar Bardhwaj दर भारद्वाज	do	Jangam. जङ्गम
6. Dev Bardhwaj देव भारद्वाज	do	Jatu. जटु
7. Bhoot Upmanu भूत उपमन्य	Malmasi म० मा०	Dev, Khavree, Braroo, Sabeda Uppal. देव, खवरी, ब्रारु, स्बेदा, उपल
8. Bhoot Upmanu Sheelan kayan भूत उपमन्यु शीलां कायन	do	Ganju, Ganz. गंजु, गंज
9. Swamin Attri स्वामिन् अत्रि	do	Shal, Handu, Sikh, Chak. शाल, हंडु, सिख, चक,

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Name of the *Gotra.*	Malmasi or Banamasi.	Names of the Families included in the *Gotra.*
10. Shandalya शांडल्य	Malmasi म० मा०	Shar. शार
11. Swamin Watsa Gargi स्वामिन वत्स गार्गेय	do	Sum, Langoo. सुम, लंगु
12. Swamin Koshak Watsa Upamanu स्वामिन कोषिक वत्स उपमन्यु	do	Choku. चोकु
13. Sharman Koutsa Attri शर्मन् कौत्स आत्रेय	do	Datt, Gadva, Baldatt, Nand, Agu. दत्त, गडुवा, बलदत्त, नंद, अगु
14. Deva Parashar देव पाराशर	do	Yachh. यछ
15. Swamin Gottam स्वामिन् गौतम	do	Kaloo, Tulsi. कल्लु तुलसी,
16. Dev Parashar देव पाराशर	do	Bahugan, Tulsi. बहुगण तुलसि,
17. Dhar Kapishthal Uppmanu दर कापिष्ठल उपमन्यु	do	Yeech येछ
18. Mitraman Koshak Attri मित्रामन कोशक आत्रि	do	Pandit. पण्डित
19. Dattatri Kaul दत्तात्रेय कोल	Banamasi मा० मा०	Kaul, Nagari, Jalali, wattal, Nika, Sultan, Ugra Moja, Vunt. Tota, Kisu, Mandal. Nagri, Rafij, Bali, Simha, Jawansher, Aima, Bamzai, Drabikak, कोल, नगारी, जलाली, वातल, निका, सुलतान, उग्रा, मोज्रहा, ऊंट, तोता, किसु, मन्दल, नगारी, राफिज, भाली, सिहं,

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Name of the *Gotra*.	Malmasi or Banamasi.	Names of the Families included in the *Gotra*.
		जवानशेर, ऐमा, बामजाई, द्राबिकाक
20. Upmanu (Upma) उपमन्य (उपमा)	Malmasi म० मा०	Dev. देव
21. Dhoom धूम	do	Rajdan. राजदान
22. Kantha Dumayan कण्ठ धौम्यायन	Banamasi भा० मा०	Rajdan, Wangni, Muju, Sher. राजदान, वांगनि, भूजु, शेर
23. Swamin Maudgali स्वामिन मौदगलि	Malmasi म० मा०	Rajdan, Khazanchi, Mushran, Kanth, Haswalu, Jabu राजदान, खजानची, मुशरान, कंठ, हस्तवाल, जाबहू
24. Swamin Gautam स्वामिन गोतम	do	Gurtu, Rajdan, Nakaib, Thalchur, Kak, Labroo, Langar, Chrangoo. Kakpuri, Badam, Kazi, Chilam, Chilmoo, Thappal Paddaru, Khosa, Raina, Parmujari. गूरटु, राजदान, नकीब, थालचूर, काक, लाबरु, लंगर, चरंगु, काकपुरि, बादाम, काजि, चिलम, चिलमु, थपल, पडूरू, खोसा, रेना, पारमुजरि
25. Swamin Gottam Logakhshi स्वामिन गोतम लोगाक्ष	do	Rajdan. राजदान
26. Swamin Bardwaj स्वामिन भरद्वाज	Banamasi भा० मा०	Tiku, Munshi, Khar, Miskeen, Khan, Wajari तिकु, मुनशी, खर, मिस्कीन, खान, वाजारी
27. Paldeva Dass Gargi पालदेव दास गार्गि	Malmasi म० मा०	Putt, Kadalbuju, Kakroo,

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Name of the *Gotra.*	Malmasi or Banamasi.	Names of the Families included in the *Gotra.*
		Langroo, Bakaya, Khashu Kachloo, Misri, Khar, Nam, Sulla, Shivpuri, Meerakhor.
		पूत, कदलबजु, कुकरू, लंगरू, बकाया, खशु, कचलु, मिसरी, खर, नाम, सुला, शिवपुरि, मिरा-खोर
28. Patt Swamin Koshak पत स्वामिन कोशक	Banamasis मा० मा०	Ganjoo, Kachroo. Chalu, Mam, Jattoo, Ambardar, Muthu, Braroo, Pandit, Wanchoo, Mian, Jawansher, Fotedar, Killu, Vaishnavi, Salman.
		गंजु, काचरु, चलु, माम, जटु, अंबारदार, मटु, ब्रारु, पंडित, वांचु, मीया, जवानशेर, फोतेदार, कलि, वेशनवी, सलमान
29. Dev Pat Swamin Upmanu Koshak देवपत स्वामिन उपमन्यु कोशक	Malmasis म० मा०	Shivpuri. शिवपुरि
30. Bawa Kashpath Upmanu मवा काशपत्त उपमन्यु	Banamasis मा० मा०	Wanikhan. वानीखान
31. Dev Upmanu देव उपमन्यु	Malmasi म० मा०	Khosa, Mewa, Pandit. खोसा, मेवा, पण्डित
32. Sarwaman Vas Upmanu स्वामिन वास उपमन्यु	do	(Walu) Wali (वलू) वली
33. Swamin Upmanu स्वमिन उपमन्यु	do	Geygu गिगु
34. Bhut Upmanu Shalkayan भूत उपमन्यु शालकायन	do	Geeroo. गेरु

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Name of the *Gotra*.	Malmasi or Banamasi.	Names of the Families included in the *Gotra*.
35. Swaminwas Upamnu स्वामिन वास उपमन्यु	Malmasi म० मा०	Bhat. बट
36. Kash Upmanu कश उपमन्यु	do	Bhat. बट
37. Bhut-was-upmanu Logakshi भूतमाव उपमन्यु लोगाक्ष	do	Peshan, Jalapuri, Thakur. पेशन, जालपुरि, ठाकर
38. Raj Bhut Logakhshi राजभूत लोगाक्ष	do	Bhan. मान
39. Ratar Bargosey रातर भारगोसे	do	Jitshu. जितशु
40. Bhut Logakhshi Raso Myavan Gottam भूत लोगाक्ष रसोम्यायन गोतम.	do	Handu. हंडु
41. Dev Mun Gottam Koshak Madgali Bardwaj देव मुन गोतम कोशक मुदगल्य मारद्वाज	do	Kukil, Pandit कुकिल, पंडित्
42. Swamin Mudgali Parashar स्वामिन मुदगल्य पाराशर	do	Geeru. गरु
43. Swamin Bassa स्वामिन बास्सा	Banamasi मा० मा०	Pandit, Raina, Tabchi. पंडित, रेणा, तबचि
44. Swamin Koshak स्वामिन कोशक	Malmasi म० मा०	Thakar, Wattal. ठाकर, वातल
45 Swamin Bargav स्वामिन भार्गव	do	Bali, Vattu. बालि, वटु
46. Swamin Koshak Bhardwaj स्वामिन कोशक भरद्वाज	do	Batt, Kukroo. बट, कुकरु
47 Swamin Shandali स्वामिन शांडल्य	do	Pandit, Wass. पंडित, वास

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Name of the *Gotra.*	Malmasi or Banamasi.	Names of the Families included in the *Gotra.*
48. Swamin Watsa Attri स्वामिन वात्स अत्रि	Malmasi म० मा०	Gassi, Waja, Thussu. घासि, वाजह, ठुसु
49. Swamin Gottam Attri Shalan Kotas स्वामिन गोतम अत्रि शलान कोतस	do	Raina. रेना
50. Swamin Gottam Attri स्वामिन गोतम अत्रि	do	Pattu. पटु
51. Swamin Bhargav Bardvaj Wasattri स्वामिन मार्गो मारद्वाज वासात्रि	do	Kalu. कलु
52. Swamin Kantha Kashap स्वामिन कंठ कशप	Malmasi म० मा०	Labbu. लाबु
53. Swamin Gargi स्वामिन गार्गी	do	Machamah. मचामाह
54. Swamin Gankoshak स्वामिन गणकोशक	do	Padey. पाधे
55. Swamin Gottam Bardwaj स्वामिन गोतम मरद्वाज	do	Raina, Raj, Kamda. रेणा, राज, कमदा
56. Swamin Das Loghaki स्वामिन दास लोगाच्च	Banamasi मा० मा०	Naru. नोर
57. Bardwaj मरद्वाज	do	Dhar Misiri, Jwansher, Bangi, Thalchoor, Turki Kandari, Trichal, Wuthu Waguzari, Wangnu. दर, मिसरी, जवानशेर, बांगी थालचूर, तूरकि, कंधारि, त्रिसल, वूथू, वागुजरि, वांगनू
58. Vashishta Bardwaj वसिष्ट मारद्वाज	Malmasi म० मा०	Bhat, Hakhu, Handu. बट, हुखु, हडु
59. Dev Bardwaj देव मारद्वाज	do	Bhat, Kalu, Gadar. बट, कलु, गाडर

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Name of the *Gotra*.	Malmasi or Banamasi.	Names of the Families included in the *Gotra*.
60. Sharman Bardwaj. शर्मन भारद्वाज	Malmasi म० मा०	Bhat. बट
61. Dev Bardaj Koshak देव भारद्वाज कोशक	do	Deva. देवा
62. Nanda Koshak Bardwaj नंदा कोशाक भरद्वाज	do	Bhat. बट
63. Sandali Bardwaj शांडल्य भारद्वाज	do	Bhat बट
64. Koshak Bardwaj कोशक भारद्वाज	do	Bhat. बट
65. Sandali शांडल्य	do	Kar. कार
66. Chhand Shandali छंद शांडल्य	do	Sadhu. साधु
67. Dhar Shandali दर शांडल्य	do	Jogi. जोगि
68. Dhar Wasak Shandali दर वासक शांडल्य	Banamasi मा० मा०	Safaya. सफाया
69. Hardev Sheelan Kapil हरदेव शीलान कपिल	Malmasi म० मा०	Motta. मोटा
70. Shar Shandali शर शांडल्य	do	Sad. सद
71. Raj Shandali राज शांडल्य	do	Darru. दरु
72. Samu Shandali समु शांडल्य	do	Bhat. बट
73. Swamin Rishi Kin Gargi स्वमिन ऋषिकिन गार्गि	do	Kaul (Kamjat). कोल (कमजात)
74. Sheelan Kottas शीलान कोत्स	Banamasi मा० मा०	Telwan, Kaul, Muku. तेलवां, कोल, मकु
75. Kotas Attri कोत्स आत्रि	Malmasis म० मा०	Bhat. बट

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Name of the *Gotra*.	Malmasi or Banamasi.	Names of the Families included in the *Gotra*.
76. Raj Datta Attri Sheelan Kotas राज दत्त आत्रि शीलान कोत्स	Malmasi म० मा०	Bhat. बट
77. Sharman Attri शर्मन आत्रि	do	Gaddu. गड्डु
78. Bhu Attri भू आत्रि	do	Warikoo. वार्कू
89. Swamin Warsha Ganey स्वामिन वार्षगण्य	do	Kaw, Katju, Chothaee. काव, काठजू , चोथाई
80. Bava Kashpatal भवा कशपटल	Banamasi मा० मा०	Kaw. काव
81. Rattra Vishvamitra Agastya रात्र विश्वामित्र अगस्त	Malmasi म० मा०	Trakru, Mattu. त्रकरु, मट्टु
82. Dar Varshiganya दर वार्षिगण्य	Banamasi मा० मा०	Safaya, Bakhshi, Kuchru, Shali. सफाया, बख्शि, कूचरु, शालि
83. Dhar Kashpatal दर कशपटल	Malmasi म० मा०	Bhat, Ladhu. बट, लड्डु
84. Kantha Kashap कंठ कश्प	do	Razdan, Bhat, Dasu. राजदान, बट, डासु
85. Mitra Kashap मित्र कशप	do	Bhat बट
86. Datta Sharma Kantha Kashap दत्ता शर्म कं. काशप	do	Raina. रेना
87. Dev Kashap Madagli Kashap देव कशप मदगलि कशप	do	Bradu. बंडु
88. Dev Kashap Madgali Gottam देव कशप मदगलि गोतम	do	Aakhun. आखून

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Name of the *Gotra.*	Malmasi or Banamasi.	Names of the Families included in the *Gotra.*
89. Dev Gargi देव गार्गी	Malmasi म० मा०	Bhan. मान
90. Dev Vasishta देव वसिष्ट	do	Akbaloo. अकबलु
91. Dev Kotas Atri देव कोतस आत्रि	do	Badgaee. बडगाई
92. Dev Vishwamitra Varshganey देव विश्वामित्र वार्शगन्य	do	Bangu. बंगु
93. Dev Gottam देव गोतम	do	Bhat. बट
94. Dev Kantha Kashap दव कन्ठ कशप	do	Kar. कार
95. Dev Logakhshi देव लोगाक्ष	do	Pandit, Mandshari. पंडित, मांठशरि
96. Dev Koshak देव कोशक	do	Bhat, Pandit. बट, पंडित
97. Aatar Varshganey Shandali आत्र वार्शगन्य शांडल्य	do	Chodari. चोदद्री
98. Koshak कोशक	do	Bhat. बट
99. Path Samin Koshak पत्थ सामिन कोशक	Banamasi मा० मा०	Dev, Ratar, Pariwar, Pandit, Watal. देव, रातर, परिवार, पंडित वातल
100. Vasisht वसिष्ट	Malmasi म० मा०	Bhat, Rangru, Teng. बट, रंगरू, टिग
101. Ratra Vishwamitra Agast रात्रर विश्वामित्र अगस्त	do	Pandit. पडित्
102. Kar Chhand Shandali कार छन्द शांडल्य	do	Chodari, Kar. चोधरी, कार

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Name of the *Gotra*.	Malmasi or Banamasi.	Names of the Families included in the *Gotra*.
103. Mitra Koshak मित्रा कोशक	Malmasi मा० म०	Pandit. पण्डित
104. Sharman Kotas शर्मन कोतस	do	Bhat, Seysu. बट, सिसू
105. Datta Das दत्त दास	do	Khar. खार
106. Vasishta Swamin Mungali वसिष्ट स्वामिन मुङ्गल्य	do	Bandari. मण्डारि
107. Ishwar Shandali Koshak ईशर शांडल्य कोशक	do	Rawal, Nakhasi. रावल, नखासि
108. Watt Datta Shelan Kotsa वट दत्त शेलान कोतस	do	Bhat, Sindu, Kasab, Malik, Khanmushu. मट, सिंधु, कसाब, मलिक, खनमशु
109. Parasher पाराशर	do	Yadh. यद्य
110. Dev Shandali देव शांडल्य	do	Battaphaloo, बत फलु
111. Ratara Warshaganey रातर वार्शगन्य	do	Kotroo. कोत्रु
112. Atra Barguwa अत्रा मार्गुवा	do	Happa. हपा
113. Boot Logakhshi भूत लोगाक्ष	do	Pandit. पण्डित
114. Raj Wasishta राज वसिष्ट	do	Shanglu. शंगलु
115. Datta Warshaganey दत्त वार्शगन्य	do	Sanor, (Sonar). सनर
116. Reshi Koshak ऋषि कोशक	do	Kashkari (kashkhari). काशकारी, (काशखरि)

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Name of the *Gotra* :	Malmasi or Banamasi :	Names of the Families included in the *Gotra* :
117, Reshi Kotsi Grama ऋषि कोतसि गार्म	Malmasi म० मा०	Jaru. ज़ारू
118. Nand Koshak नन्द कोशक	do	Bhat. बट
119. Sumavatsa Gargi सुमवातस गार्ग	do	Bhat, Soom. बट, सुम
120. Swamin Maigali स्वामिन मेग्ली	do	Madan. मदन
121. Swamin Daswasi स्वामिन द्वासबासे	do	Khan, Katva. खान, कटुवा
122. Dattatri दत्तात्रि	Banamasi मा० मा०	Kaul. कोल
123. Sharma, Kashyapa. शर्मा काशप	Malmasi म० मा०	Kaul. कोल

The above list of *gotras* of various Kashmiri Pandit families is no doubt exhaustive. But in certain cases of certain families variations of *gotras* may be noted. These variations are due to many reasons. For instance a parent admitted to school from his maternal grand father's house retained the nickname (*Jat*) of his maternal grand father's family but the *gotra* that of his original family. This variation continued to be followed by his descendants. Likewise in certain instances at the time of marriage of a couple if the matter of their belonging to an identical *gotra* remained unnoticed, the nick name of either the mother's father's family or that of the father's family was adopted with a variation of the *gotra* of either of these families. These variation here and there should not lead the reader to suspect the correctness of the list of *gotras* of various Kashmiri Pandit families cited above.

Karm or nickname.

Besides *gotra*, each family has a *kram* or nick name added to the original name by reason of the head of the family's or any of his ancestor's special calling or because of such peculiar circumstances which has occured to him. For instance a man named Wasdev, had a mulberry tree growing in his courtyard and, therefore, he was called Wasdev *Tul* (Mulberry). He in order to get rid of this nick name, cut down the tree But a *Mund*

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(trunk) remained and people began to call him Wasdev *Mund*. He then removed the trunk of the tree and by its removal, a *Khud* (depression) was caused and henceforth people called him Wasdev *Khud*. He then filled up the depression and the ground became *Teng* (a little elevated) and he began to be called Wasdev *Teng*. Thus exasperated, he left to do any further attempt to remove the cause of his nick-name and it continued to be *Teng* which is now attached to the names of his descendants. Likewise many families who resided in rural areas or shifted their residence from those rural areas to the towns or the city of Srinagar are mostly known by the names of the villages where they resided or from where they orginally shifted their places of residence. *Thussus* are, therefore, those whose ancestors resided in a village known as *Thuss* in Kulgam Tehsil. *Kilams* are those who resided or have shifted their residence to the city from village *Kilam* in Kulgam Tehsil. *Darinds* are those whose ancestors originally lived in a village known as *Darind* in Tehsil Khas. *Krandgooms* are those who have migrated from village *Krandgoom* in Tehsil Anantnagh. *Sopori* is the kram of the families who either resided in or shifted from Sopore. Thus *Thussus, Kilams Krandgooms, Darinds, Sopori* is the *Kram* of those families, who resided or have migrated from the villages Thuss or Kilam or Krandgoom or Darind or Sopore. Likewise *Mirza* is the *Kram* of those families whose ancestor was either an employee of a muslim belonging to the Mirza family or whose ancestor lived in the neighbourhood of 'Mirzas', a family of the muslim religion. *Nehru* is the *Kram* of those families whose ancestor took residence near a local *Nahar* or Canal in the city. *Harkar* is the Kram of the families who are the descendants of an ancestor who was employed as a *Harkar* namely carrying of letters from one place to another. *Bazaz* is the Kram of the families whose ancestor was a *Bazaz* namely, doing business in cloth. *Baqaya* is the *Kram* of those families whose ancestor was employed on the post of a Tehsildar with duties to recover *Baqaya* namely the arears of revenues for the Sikh or the Pathan Rulers of the country. *Kral* is the Kram of the families whose ancestor was employed to collect taxes from *krals* or potters. *Munshi* is the Kram of the families whose ancestor was employed as a *munshi* namely a degnified clerk in the times of the Sikhs or the Pathans. *Jawansher* are the descendants of a Kashmiri Pandit who discharged the duties of a Reader with Amir Jawansher who was one of the renowned governors of Kashmir during the Afgan period. *Waza* is the Kram of those families whose ancestor took to the profession of a *Waza* namely a cook or whose ancestor some time out of his own personal delight cooked a good dish with his own hands for a dignified guest who nick named him a *Waza* subsequently. The Kram or nick name of each Kashmiri Pandit family can, likewise, be traced by reference to the history of those families.

Loj Bhattas.

During the Mohommadan rule some Brahmans were once

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given option to either submit to the sword or take food prepared by a Mussalman. They naturally quivered at the prospect of death and unwillingly accepted the latter alternative; but in their anguish to reduce pollution to its minimum, made the Mussalman cook (boil) rice in a new *lej* or earthen pot and when ready, took it out from the *lej* or earthen pot with their own hands and reluctantly ate it. They afterwards expiated for the forcible pollution by performing *Prayaschitta* but still the *Baradari* who were as pure as ever, did not keep any social connections with them, condemning them for not having preferred death to losing their caste by pollution as thousands others had boldly done under such circumstances. Their descendants are called *legibat* because of their ancestors having eaten food cooked by a Mohommadan in a *Leg*. A stigma also attaches to the members of the caste known as *Wurud* or *Purbi*, who are the illegitimate offspring, or are the offsprings of the widows who secretly married in olden times in Kashmir in contravention to social laws or are of a mixed union in which one of the parents is a Brahman and other a Khatri. No Brahman will take food touched by a

Wurud or Purbi:

Lejibat, Wurud or *Purib*. In the time of Zain-ul-abdin the Brahmins, who studied persian and took to Government services, were called *Karkuns*. With the advent of Sikh rule in 1819 A. D. some *Karkuns* began the study of Sanskrit literature again, and they were called Pandits. *Karkuns* don't intermarry with *Bachabats*. Those who are versed in astrology and draw up calendars, cast horoscopes and profess to prophesy future events are called *Jotshis*. The priests who preside over Shiva worship, are called

Panyechh:

Gurins. The *Panyechh* are those who receive alms and other offerings connected with funeral obsequies. Their office is regarded as derogatory by the *Bachabats* as well as *Karkuns* who for this reason, look down on them and refuse to take food from their hands.

Buhras:

An extract from the 'Census Report' about the "Buhras" may be given as follows:—

"This is a caste of Hindus not being Brahmans, descended from the *Chhatri* stock, whose principal business is trade and shop-keeping. Having adopted the rites and the ceremonies of the Brahmans, they are excluded from relationship with the Punjabi Khatris, and therefore intermarry among themselves. It is not known when they originally settled in Kashmir, but from their customs and habits it appears, probably that they came into the country prior to the advent of the Mohommadans. There is evidence to show that in times gone by they were freely admitted to caste among Pandits, as for instance, the reputed family of Chaudhri Mohesh, the builder of the nine masonary bridges in the Dal and of the dry causeway across it nearly four miles in length, on which those bridges are situated. But with this notable exception, the Buhras did not appear to have been admit-

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ted to fellow casteship in any manner with the Pandits. The Buhra women, unlike the Pandits, does not wear a waist girdle while also unlike her, she does wear a nose ring. In all other respects the habiliments of Buhras of both sexes are undistinguishable from those of the ordinary Pandits. In general disposition, they are closely assimilated with the Dogra and Bakal castes. Local *Purabeahs* are an offshoot of this caste, whose general occupation is personal service"

Sikhs. They are generally Brahmans by caste and have their marriage ceremony just the same way as the Pandits with the difference that *"Anand Sahib"* is also recited in their marriage. *"Tatta Khalsa"*—a sect of sikhs is also of recent importance in the valley. They don't perform the marriage ceremony according to Dharam Shastra, but only by recitation of the *"Anand Sahib"*. They have the distinctive obsequial ceremonies and don't perform the Shradha rites.

Jinsi Sikhs. There is a story mentioned in the Census Report of the year 1911 which says that the Jinsi Sikhs were Punjabi Brahmans and during the year 1751 to 1762 A. D. in the reign of Emperor Ahmad Shah Durani, Raja Sukhjiwan, Subah of the Emperor brought the Jinsi Sikhs from Potowar and the adjoining hills to assist him in asserting his independence against his master. As these mercenaries were paid in kind and had, in the time of Maharaja Ranjit Singh, embraced Sikhism, they began to be called *Jinsi Sikhs*, or Sikhs in receipt of rations. The Jinsi Sikh is mostly found into following portions of Kashmir territory, viz. Parganas Tral, Hamal, Kirohon, Biroh, and Runbirsinghpura. They live by agriculture and personal service. A brief history of the Sikhs of Kashmir has been incorporated in the Census Report of the year 1941 the relevant part of which is cited below for ready reference in this connection :-

"Whilst the main influx of Sikhs to the country followed its conquest by Maharaja Ranjit Singh of the Punjab there is evidence to show that there were Sikhs in small numbers in the country as early as the sixteenth century. Guru Nank visited Kashmir and is said to have made converts. The Gurdwara at Martand commemorates his visit. Guru Hargobind also visited Kashmir by way of Sialkot and probably followed the Moghal route. Gurdwaras at Srinagar, Bâramulla and Muzaffarabad commemorate his visit. His teaching probably resulted in a number of the inhabitants of Srinagar and the neighbouring villages embracing Sikhism. Possibly he left behind some of his disciples to carry on his work. Sikhism cannot be said to be indigenous; a few local converts don't make it so. However, it is clear that its existence in the State goes back to a date before the advent of Sikh rule. As already remarked, its beginnings in the Kashmir province at any rate, would appear to date from the visits of

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Gurus Nanak and Hargobind. A story appears in previous Census Reports from 1911 onwards to the effect that during the period 1751–1762 A. D. certain mercenary troops were engaged by Raja Sukhijiwan, Governor of Kashmir at the time, to assist him to assert his independence against his master, Emperor Ahmad Shah Durrani of Kabul. According to the story these mercenaries embraced Sikhism in the time of Maharaja Ranjit Singh and were called "Jinsi Sikhs" from the fact that they were in receipt of Jins (grain) as military rations. Later, they are said to have settled in various parts of the country and to have started the Sikh settlements now found at such places like Tral Hummal, Baramulla etc. The story is a bit confused ; it states that Raja Sukhijiwan "brought Jinsi Sikhs from Pothwar and the adjoining hills" and goes on to say that "they embraced Sikhism in the time of Maharaja Ranjit Singh." These statements are contradictory. Ranjit Singh did not come on to the scene until long after 1762. If any mercenaries embraced Sikhism in the time of Ranjit Singh they could not have been those brought in by Sukhijiwan. It is possible the mercenaries brought in by Sukhijiwan were Sikhs and not Punjabi Brahmans as has been stated in earlier reports. It is also possible that the descendants of these mercenaries, who may have been Punjabi Brahmans, were here when Ranjit Singh conquered the country and that either they entered his service as Sikhs or embraced Sikhism then. In those days land revenue was collected in kind with the assistance of the military. The unit employed was known as the Nizamat Paltan which consisted of Sikhs. It is probable that these men became known as "Jinsi Sikhs" to distinguish them from the members of other Sikh units because of their association with the collection of grain (jins). This, of course, is pure conjecture but then the story of Raja Sukhijiwan and his "Jinsi Sikhs", although going back to the census reports of 1911, is only based on a story related by a certain official at the time of the 1911 census. Whether there was any influx of Sikhs in the period 1751-1762 or not, it is clear that, although there were Sikhs in the country previously, most of them now living in the State are the descendants of those who came to the country with Ranjit Singh's invading army and during the period of Sikh rule (1819–1848). This is supported by the fact that the largest aggregations of Sikhs are found in those areas of the state closest to the Punjab which had close associations with the Sikh court at Lahore. Ranjit Singh first attacked Jammu in 1808. The Sikhs were not successful at their first attempt to conquer Jammu. But by 1809 Gulab Singh, later the first Maharaja of Jammu and Kashmir, had joined the Sikh army at Daska, near Sialkot at Ranjit Singh's request. It is reasonable to presume that Sikhs commenced to enter the Jammu Province in considerable numbers from this date onwords up to the time of the fall of the Sikh kingdom in 1846.

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A brief history of the advent and spread of Mohommadanism in Kashmir is contained in the Census Report of 1911, the relevant extract of which is cited below in extenso :-

Mohommadans.

"Upto 1340 A. D. there was not a single Mohommadan in Kashmir. In 1341 Bulbul Shah a Mohommadan ascetic of renown came here from Turkistan *via* Ladakh, and took up his habitation in a spot just below the Ali Kadal (5th bridge of the Srinagar city), where his Mausoleum is held in great veneration. In those days Reinchan Shah a Thibetan and Budhist, whose original name was Ratanjabu, had been banished from his country while yet a youth, and sought the protection of Raja Udiandev, king of Kashmir, who gave him an asylum and assigned him a Jagir to live in Parganah Lal. Meanwhile an expedition headed by Zukhdar Khan marched into Kashmir, and Udiandev escaped the general slaughter which followed, by relinquishing his kingdom. Reinchan Shah, who remained behind, forcibly married his Rani (known as the Kut Rani), and took possession of the Kingdom.

"Having been expelled from the father-land in tender years, Reinchan Shah was naturally ignorant of the doctrine and ritual of his original faith. He offered to become a Hindu, but on his application being rejected by the Brahmins, Bulbul Shah prevailed on him to embrace Mohommadanism. It was in this manner that the Mohommadan faith first found its converts and adherents in Kashmir, and under the auspices of a line of Mohommadan Kings in general, and Sikandar (idol-destroyer) in particular, increased so steadily, that the country may now be said to be almost Mohommadan, the resuscitation of the Hindu community dating only from the days of Zain-ul-abdin. The proselytes to Islamism in Kashmir were mostly from the original Hindu population—strangers and foreigners being but few—and this is the more patent from the fact that the present Mohommadan population is divided and sub-divided in accordance with the distinction observable among their fellow countrymen though the lapse of years has slightly modified particular caste derivations so as to make them unrecognisable by the light of previous custom. It has come to be recognised as a sort of analogy, that as the trade, habitual occupation of the person, so the peculiar affix to his name ; as for instance, Aziz Khar, the 'Khar' referring to the occupation of blacksmith, Sobhan Chan, or carpenter, then again Ramzan Kakpura from Kakpur, the name of the ancestral home, etc., etc,"

"Of course it must be expected that a certain proportion of the resident Mohommadan population comprise families whose progenitors or common ancestors had been foreigners, and although, as already observed, these are remarkably few, it is significant

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that they are up to the present even known as *'Bahar Se Aye Hue'* or foreigners."

Sheikhs. "The Sheikhs who are the convert class of Kashmir Mohommadans, as distinguished from the Sayed Moghal, or Pathan, are the following castes :—

(1) "*Pirzadas*, the descendants of Fakirs (holy mendicants) and others of religious worth or sanctity, quite irrespective of their descent.*

(2) "*Babazadas*, or descendants of Khalifas of Makhdum Sahib, whose shrine is considered the most sacred in the country."

(3) "*Vains*,† the original Mohommadans of Srinagar city, considered also the purest and of the best descent. These are sub-divided into castes as follows :—

(1) Kanth, (2) Gundru, (3) Bachh, (4) Gani, (5) Dar, (6) Bandi, (7) Gunch, (8) Pakhsival, (9) Ashai, (10) Vakil, (11) Shal, (12) Kunru, (13) Ishlu. (14) Diwani."

"Of a lesser status among Mohommadans of Kashmir are the shawl weavers, and embroiders and the Zamindars of the country, and it must be remembered that those from among them who know Arabic are, in addition to their names styled Mulla, Vains, and Maulvi."

The Mohommadan tribes may be divided as follows :—

Sayeds. (1) *Sayeds*—They are regarded to be the most respected class owing to their descent from the Prophet. The titular nomenclature of the Sayed is *'Mir'*, and curiously enough the epithet *'Mir'* changes its significance just as it is used either as an affix or prefix to the name of Sayed. A Sayed's position, whether he is a priest or a lay man, is determined according as the word *'Mir'* stands before or after his name. Sayeds are sub-divided into the following classes viz. those :—

(*a*) Who practise *'Pirimuridi'*—the vocation of spiritual intution to disciples ; and

(*b*) Who have taken to agriculture.

(2) *Sheikhs*: They are the descendants of the original

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* But it seems that the Pir-zadas are the Purohit class of Mussulmans.

† The corruption of a Vani which means a trader.

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Hindus who were converted to Islam by Mohommadan conquerors or propounders of Islam like Sikandar or Shah Hamdan. They have by now lost all the family traditions they inherited from their ancestors who were converted to Islam. But it will be noticed that their *Kram* or tribe name usually resembles those of the Hindus. It is very difficult to make a classification of *Sheikhs* according to social precedence simply because of the fact that there is a tendency among the *Sheikhs* to abandon their old family *Kram* and assume any imposing titles. Mr Lawrence has happily remarked about these *Sheikhs* in the following words: "There is nothing to prevent Abdulla, the *Doom*, calling himself Abdulla *Pandit* if he choose. At first the people would laugh but after a time if Abdulla *Pandit* prospered, his descendants would exhibit a lengthy pedigree table tracing their family back to one of the petty Rajas, lord of three villages and possessor of a fort; the ruins of which still stand in Abdulla *Pandit's* village.

"The chief among these, however, are *Pirzadas*, the highly respected class, the Babas, the class of religious mendicants, the *Rishis*, Sajjada-nishins or servitors at Mohommadan shrines and Mullahs. Among the inferior tribes may be mentioned the Dooms, Galawans, Chahkans, Hanjis, Bands, and Watals."

These Mohommadans in the valley have generally one and the same custom, as they are mostly converts from the Hindus Only in the fixing of *Mahars* there is a difference which is regulated by the position of families. Gujjars are immigrants from the Punjab and they retain their own language and custom

Watals

Watals are sub-divided into *Mochee-Watals* and *Shup-Watals* They are Mohommadans by religion. But the *Shup Watals* have the custom of eating the corpses of the animals and have faith in their Pir 'Lall Beg' and have some customs different from the Sunni Mohommadans. But, nevertheless, they declare themselves to be Mohommadans. *Mochee-Watals* are almost strict Mohommadans following the same customs as are followed by the Zamindars.

Mughals

(3) *Mughals*: They came to Kashmir in the early part of Mussalman reign, but they have now practically lost all trace of their nationality and intermarry with other Kashmir Mussalmans in the valley.

(4) *Pathans*: They inhabit chiefly in the Uttarmachipura Tehsil and are more numerous than the Mughals.

At the time of making an inquiry into a point of custom on any matter concerning succession, inheritance, dower, divorce, family relations etc., it is but natural that names of relations involved would be referred to by witnesses in Kashmiri. It is,

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therefore, necessary to give below a list of the *Kashmiri* relations for the guidance of the courts invested with functions to make such inquiries in various cases pending adjudication before them.

Kashmiri relations

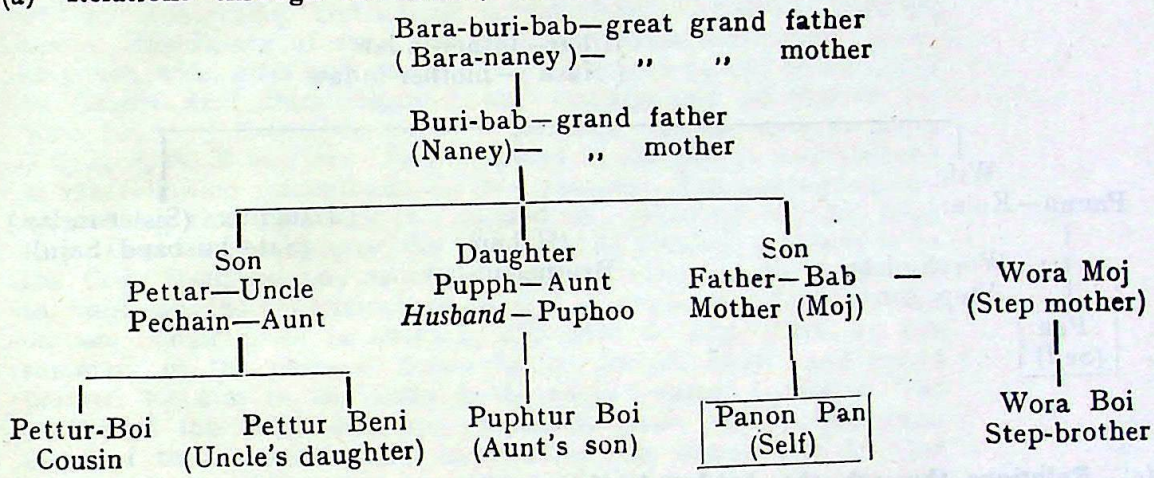
Bab or Mole (father); Garyuk Budibab (father's father); Gareech Naney (father's mother); Garyuk Bada-budibab (father's father's father); Gareech Badananey (father's father's mother); Bada-bada-budibab (father's great grand father); Petar (father's brother); Pechein (father's brother's wife); Peutur Boi (father's brother's son); Pupph (father's sister); Pupphoo (father's sister's husband); Pupphtur Boi (father's sister's son); Maj or Moj (mother); Boi (brother); Beni (sister); Mass (mother's sister); Masu (mother's sister's husband); Worah Moj (step mother); Worah Mol (step father); Worah Boi (step brother); Worah Beni (step sister); Mam (mother's brother); Mamain (mother's brother's wife); Mamutur Boi (mother's brother's son); Mamatur Beni (mother's brother's daughter); Bai-kakain (brother's wife); Babthar (brother's son); Benza (brother's daughter); Baima (sister's husband); Benathar (sister's son); Maji Budibab (mother's father); Matamalech Naney (mother's mother); Matamaluk- Bada-Budibab (mother's father's father); Matamalech Bada Nain (Mother's father's mother); Kolai (wife); Roon (husband); Hash (wife's or husband's mother); Hihur (wife's or husband's father); Bada Hihur (Husband's or wife's father's father); Bada-Hash (husband's wife's father's mother); Petra Hihur (husband's or wife's uncle); Petra Hash (husband's or wifes aunt); Masa-hihur (husband's or wife's mother's sister); Puppha Hihur (husband's or wife's father's sister's husband); Puppha Hash (husband's or wife's father's sister); Zam (Husband's sister); Sal (wife's sister); Zami (husband's sister's husband); Sajuw (wife's sister's husband); Nechuw (son); Worah nechuw (step son); Drui (husband's brother); Drakakain (husband's brother's wife); Nosh (son's wife); Soneyein (son's wife's mother or daughter's wife's mother); Sonue (son's wife's father or daughter's wife's father); Kur (daughter); Zamatur (daughter's husband); Zur (daughter's son); Benza Zamatur (sister's daughter's husband).

It will be observed that the Kashmiri language is much richer in names for relationship than most of the European languages and it is politeness and endearment which gives rise to various forms of address.

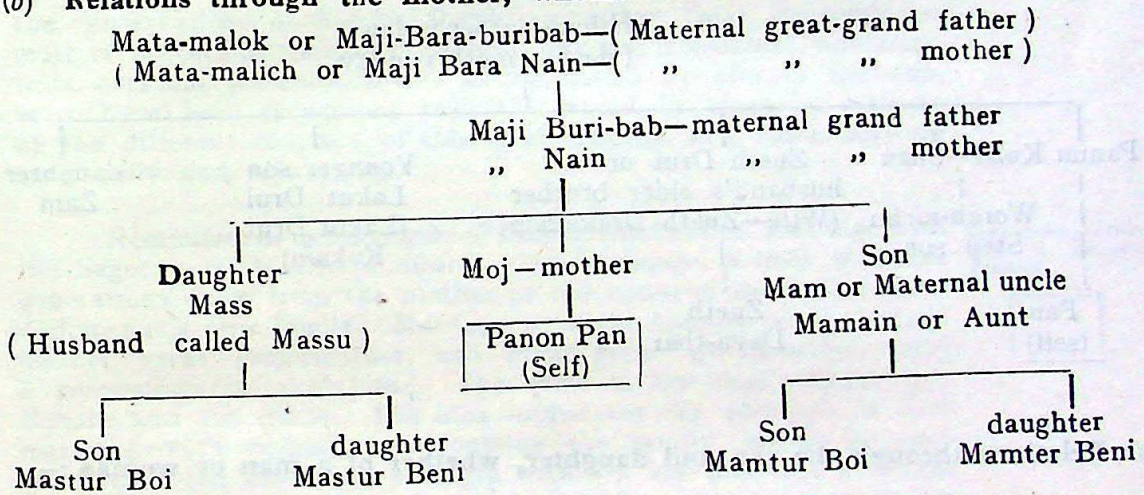
Some of the more important relations of the Kashmiri's are tabulated below for facility of understanding of those readers of this book who are not well versed in Kashmiri language :-

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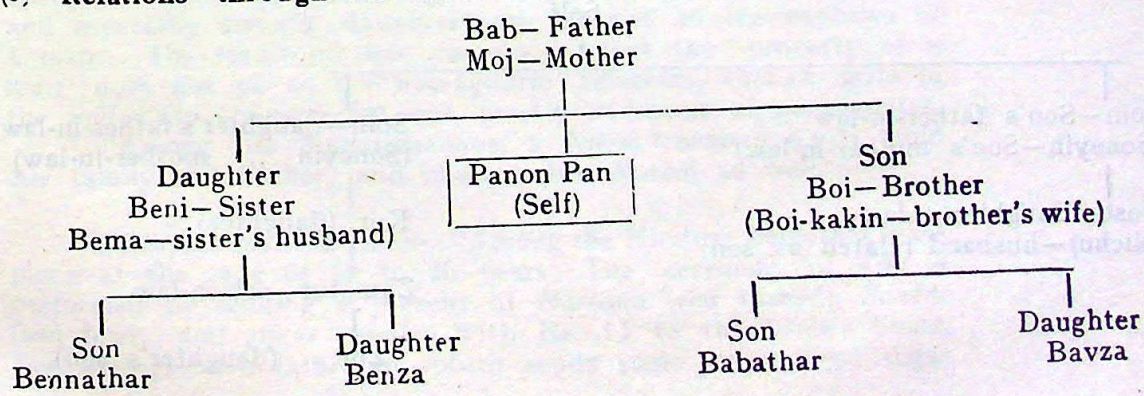
(*a*) **Relations through the father, whether of man or woman:**



(*b*) **Relations through the mother, whether of man or woman :—**

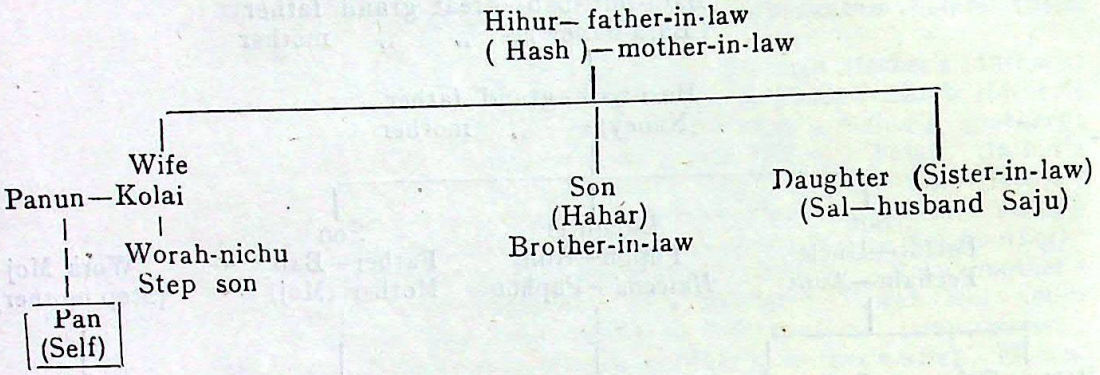


(*c*) **Relations through the brother and sister, whether of man or woman :**

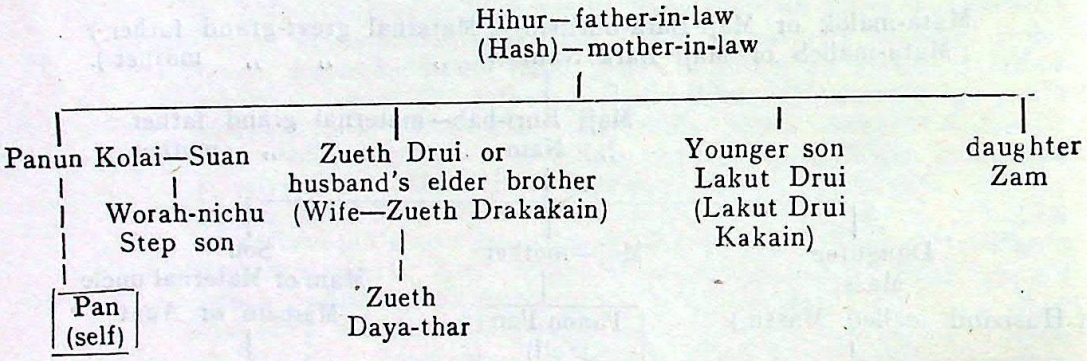


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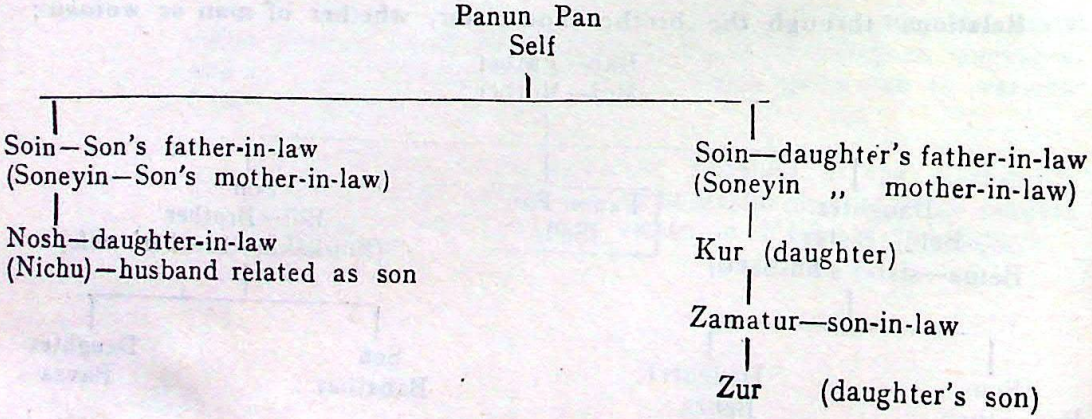
(*d*) **Relations through the wife of a man :—**



(*e*) **Relations through the husband of a woman :—**



(*f*) **Relations through the son and daughter, whether of a man or woman :—**



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Special features of the customs prevalent in the valley in matters concerning restrictions on marriage, betrothal, divorce, dower, inheritance of sons, widows, daughters and other heirs, adoption, wills, gifts and pre-emption have been briefly summarised by Pandit Sant Ram Dogra in the introductory Chapter of his book 'Code of Tribal Customs in Kashmir' (*Rivaj-i-am*) at pages 5, 6, 7, 8, 9, 10 and 11. This summary is completely incorporated in the following paragraphs of this chapter. The purpose of incorporating the summary in extenso as given by Pandit Sant Ram Dogra is to obviate the necessity of making a reference to the Code itself by any practical lawyer, who may be motivated to build up the superstructure of any of the cases dealt by him on any single piece or extract contained at any place in the summary of the customs drawn up by Pandit Dogra and incorporated by him in the Code in the pages referred to above. The author of this work does not desire to draw up his own summary of these customs and incorporate the same here as that would be an unnecessary repitition of the matter incorporated in this book in the chapters that follow. But the extent to which the observations of Pandit Dogra regarding these customs on matters concerning marriage, dower, divorce, inheritence, adoption, wills, gifts and pre-emption etc. as mentioned by him in the summary have been recognised judicially would be clear by a study of the different chapters of this work dealing with those matters specifically and separately.

Restrictions as to marriages:—"Among the Hindus, marriage with the Sagotris is totally prohibited. No marriage is held with five generations down from the mother in the house of mother's father, and in one's own family. Marriage with the agnates of the grandmother, great grandmother, and great great grandmother upto 7 generations is prohibited. The same is the case among the Bohars and the Sikhs. The idea underlying the principle is that marriage with woman from outside the family brings in new blood into the veins and strength with it. By marriage a Hindu woman loses the caste of her father, and passes to that of her husband. The Mohammadans generally marry in their own families and especially sister's daughters are married to the nephews of a man. The result of this custom is that the property of a man does not go to the non-agnatic relations, though gifts in the valley are common, but not mostly in favour of non-agnates. Rivaj-i-am from page 5 bottom quoted.

"Among the Mohammadans, a *Nikah* transfers a girl from one family to another, and changes her *Karam* as well.

Betrothal and marriage:—"Among the Hindus, betrothal takes place at the age of 10 to 20 years. The ceremony of *Tak* is performed by sending a present of *Nariwan* (red thread), *Sandur* (red lead) and sugar candles with Rs. 11 to the bride's home. The bridegroom's father in return sends some crystallised sugar

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(*nabat*) in acknowledgment of the betrothal, which is very seldom revoked.

"Betrothal with two girls simultaneously is not customary. Child marriages are very common in the town.

"Among the Mohammadans, betrothal is effected at the age of 9 to 16.

"A few respectable kins-men of the bridegroom go to the bride's home for begging of her father his daughter's hand, go-betweens having already settled the matter with the father privately.

"In very few cases, among the Sayeds and some tribes of the town *Ijab-o-qabul* ceremony is performed on the day of betrothal but generally this ceremony is deferred to the day of marriage when the bride's father delivers his daughter to the bridegroom.

"On breach of betrothal, the custom of paying compensation to the injured party is common among the low tribes, but among the men of superior class, no compensation is claimed, but the ornaments received from the bridegroom's father are returned to him.

"As most of the tribes of the valley were Hindus, they consider daughter a matter of expense to them, as they generally have to give dowries. and have to maintain them as long as they are alive. A Kashmiri generally calls himself *Kori-mol*, when he wishes to impress an officer with his poverty. Daughters were thought to be a drag upon the resources of the family, but they are considered to be a blessing since the days of institution of the *Khanadamad* system. Though there is no regular sale of daughters in the valley, services are taken from the *Khanadamad* in consideration of the hand of the daughter, that is given to him. The ceremony of marriage transfers the ownership of the girl from her parents or agnates to those of the boy. Very many ceremonies are performed on this occasion. Among the Mohammadons, the ceremony of *Ijab-o-qabul* makes the *Nikah* indissoluble till *Talak*, and among the Hindus, *Kanya-dan* (*i.e.* gift of the girl by the father or his agnates) and *Gotra-char* (the amalgamation of *Gotras*) before the sacred fire, where *Havan* is performed, makes the marriage totally indissoluble.

"Even in spite of conversion of the girl, the marriage-tie still remains there, though she is not generally brought home.

"There is no restriction among the Mohammadans to keep girls at home till they reach the age of puberty, and no question regarding *Hizanat* (custody) does ever arise in the valley.

"Girls are generally married at the age of 12 to 14 and boys 10 to 16.

"Gujjars, Shup Watals and Bahach Hanz are exceptions to this evil custom of child marriage. These tribes marry when the girls are fully grown up and bear all the signs of puberty.

"Unlike the women in the Punjab, the Kashmiri girl even of the lowest tribe does never marry without the consent of her parents or her guardians, though she may be fully grown up.

"Some Watal girls flee their homes and take to prostitution

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in the towns and the city, if they are not given in marriage at the proper age.

"It is very rare that adult girls marry of their own accord, though such marriages are valid according to the Mohammadan Law. But the people in the valley do not think it so.

"Even widows have only in a very few exceptional cases, given their consent for marriage without the mediation of the guardians, and the Sunni Mussalmans of Badgam have gone so far as to say that such marriages are totally void. In reality, as the valley is frequented by strangers, the zamindars desire to be helped by Law in the matter that no marriages of major girls should be considered valid without the intervention of their parents or guardians.

"Mutaa or temporary marriages, though only few are contracted by the Shias in the town and fewer still in the Moffussil. The parties of Mutaa do not inherit each other's property. Among the Sunnis such marriages are held unlawful.

quotation from Rivag-i-am continued.

Number of wives:— "The Kashmiri zamindar marries only one wife, although he is allowed four at a time by the Shariat, which enjoins that justice may be done to all the wives regarding supply of food, clothing and copulation. It is only among the low class people and the residents of the town, that this number one is exceeded.

"Pandits are enjoined by their sacred custom to marry only one wife, if she be not barren, diseased, decrepit, or lame, or in any other way totally disabled for household duties.

Divorce and Dower:— "Divorce is rare among the zamindars, but common among the low class people, and the middling people of the town. Though dower is generally written in the Nikah-namah, it is very rarely paid except in the towns of the valley and Srinagar.

"Among the Gujjars, it is never allowed to stand as a debt, but it is generally remitted by the wife on the birth of a child or whenever she is much pleased with her husband. Divorce is not customary among the Pandits, but marriage lasts even after the death of the husband.

"Among the Sikhs, a system of divorce locally called *Dharama-dawar* generally exists. It is resorted to when the parties do not agree with each other, or the wife happens to be of a very bad character.

"Among the Bomba Rajas, though allowed by the Mohammadan Law, divorce is not customary. It shows that even in spite of their conversion to Mohammadanism for so many centuries past, these Bombas have not lost their old customs. So also is the case with the Khakhas (who were originally Khatris).

Inheritance Sons:— "In Kashmir, though the zamindars have been converted to Mohammadanism for nearly six centuries past,

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still they retain their old custom of living on the lines of Hindu joint family system. The regard for the head of the family was so great among them only a few years ago, that some instances can be quoted, in which the head's name was entered in the revenue record for all the other co-sharers of the landed property. Father's sons, brothers, and nephews live under the same roof, and are seen having joint properties. Wives are brought for the sons, nephews, and brothers just when they are within their teens and daughters given in marriage at the same age.

Quotations from Rivaj-i-am continued.

"Daughters among the Hindus, never inherit in presence of sons, son's sons, son's grandsons, but receive only dowries. They can only inherit by gift from their father, but among the Mohommadans, the zamindar never parts with the landed property in favour of his daughter, unless the husband is brought for her to live with his father-in-law.

"Among the Shias, the giving of Sharai share to a girl in a family is very common, but no share appears to have been given outside the village. They state that the share is generally got excused by payment of a certain consideration for her share in the land.

"The payment of *Kori-har* (daughter's share) is stated to be a general practice in the town, but I find this statement to have been made out of bigotary, as on enquiry, I have found a good many girls not having received *Kori-har*.

"The custom of dividing property equally among the sons obtains among all classes, whether Sikhs, Hindus, or Mohammadans in the valley, except the Gujjars of Nandimarg, the Gakhars of Gopalpur and the Moghals of Anantnag Khas, among whom the *Chundawand* system obtains.

"No distinction regarding age, or tribe of the mother is made except among the Bomba Rajas, among whom the sons by a Bomba wife take greater share than those by a Khakha or Hatamal wife.

"Among the zamindars, if one of the sons die before his father his son or widow succeeds simultaneously with the other brothers according to the custom of the country, though the widow and the grandson are deprived of their share by the Mohommadan Law. In Srinagar the Mohommadan Law is generally followed in the matter except when a grandfather in his lifetime declares or devises his son's widow or his grandson a substitute of his (grandfather's) son in all matters.

Inheritance—"Widow: Widows do not inherit any share, when they are with sons.

"A sonless widow gets a small share of land for her maintenance from her step-sons. A widow with a daughter can retain the property of her husband till death or remarriage. If she dies or remarries, she is succeeded by her daughter, for whom a husband is brought home. During her possession of the property she can make all arrangements for its cultivation and payment

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of land revenue. She can even transfer her land to her adopted son or a daughter residing with her. She has every power over the property of the husband. She can even retain possession of the property, if she brings her second husband to live with her in her previous husband's home. This is generally done among the zamindars when the children are so small that they cannot look after cultivation and arrange for payment of the land revenue.

Quotations from Rivaj-i-am continued.

"If she remarries and goes out of her husband's home, she loses all her rights of guardianship except when the agnates of her husband are ill disposed to the orphan. In such a case, maternal uncle or mother is the best guardian.

"As a guardian the mother can alienate the property of her minor children for unavoidable expenses, incurred for the benefit of the wards. If widows take their issue with them to their new husband's home, they cannot succeed to the property of their step-father, but they are still the members of the family of their real father and inherit his property.

"Step-sons may receive any gift from their step-fathers, and hold it for ever. A sonless widow living with a widow with his sons is only entitled to maintenance, or a plot of land for life; the widow with sons enjoy the whole of her deceased husband's property through her sons.

"Shias generally abide by the Sharait in inheritance of widows. Widows do not inherit the landed property according to the Shariat, but this institute seems to have been overridden by the custom in the valley zamindars, as widows are generally found to have inherited the immoveable property of the deceased husbands. But the Shariat is strictly followed in the town, where widows get value of structures, such as houses, gardens, etc., and one-eighth or one-fourth of the property of their deceased husbands just as the circumstances permit.

"Among the Pandits, widows inherit their husbands property whether their husbands be associated with their brothers or live apart from them. The only difference is that a widow succeeds to the property only in the case when the property is divided, otherwise she is maintained by her deceased husband's brothers. She can enjoy the property for life only and has no powers of alienation except for unavoidable expenses, when they are not provided for by her husband's agnates.

"Pandit widows in the valley generally adopt sons in spite of the provisions of the Dharama Shastra.

Inheritance—"Daughters and other heirs: Among the Sunni zamindars, unmarried daughters inherit the whole of their father's proprety till marriage or death. In case of death or marriage of such daughters, the property reverts to the agnatic heirs. The powers of alienation of the property of unmarried daughters when minors are used by their guardians. The property can be alienated in making provisions for their maintenance, dowry, marriage ex-

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penses, and other subsequent ceremonies. Failing unmarried daughters, the father of the deceased person inherits before the unmarried grand-daughters, who do not reside with their grand-father. Brothers inherit equally with their *Khan nashin* sisters, *i e.*, sisters for whom *Khanadamads* are brought home to live permanently there.

Quotations from Rivaj-i-am continued.

Adoption :- "Adoption is of the Hindu origin, and has been maintained among the Mohommadans in the valley in spite of all the bigoted attacks against this institution for the past six hundred years. The zamindars of the valley still think an adopted son as good an heir as a real son. No gifts are ever announced in their favour, as they inherit their adoptive father's property as real sons would do, without any gifts or wills in their favour which some learned Maulvies desire to be made in all such cases to legalise the inheritance by the *Shariat* as well.

"It is only of late that men of the towns and the city go against this old custom on the ground of its having already been discarded by the prophet in Zaid's case (Quran 39, iv., Palmer's Translation).

"They say that an adopted son may be taken by a sonless man, but he cannot inherit his property, unless the adoptive father gives it to him by gift or will, strictly in accordance with the orders of the *Shariat*.

"Among the Shias and the Sunnis, adoptions are generally made at an age when boys are a year or two old, so that they may become attached to their adoptive parents.

"Adopted sons do generally inherit the property of their adoptive fathers. They can inherit the property of their natural father, if the father or brothers consent to it, otherwise not. A father may adopt, if his own son or the adopted son has become an atheist or irreligious.

"A man with defective organs can adopt, there being no restrictions. An adopted son may be disinherited for his misdemeanour or misconduct but this is not possible among the Pandits and the Sikhs.

"Among the Pandits, an only son or the eldest son cannot be given in adoption. The common sign for legality of adoption is that mother of the boy to be adopted as a son, could be married by the adopter, if she would have been unmarried, is totally disregarded by the Kashmiri Pandits. A daughter's son or a sister's son can also be adopted. The Dharama Shastra is not followed in adoption here.

Wills :- "The illiterate zamindars in the valley never make wills, though it is legal according to the *Shariat* upto one-third of the property. In the towns and the city, wills are made orally or in writing according to the *Shariat*.

Gifts :- "There is no restriction in the matter of gifts to relations. In case of the gift by the wife to her husband or

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by a father to his minor son, delivery of possession—an essential constituent of gift—is not necessary. Gifts may be made to strangers in presence of sons, son's sons, and other relations, but they ought to be made in favour of a Baiti Pir (a religious preceptor of the family); although no prohibition exists according to the Shariat to make a gift of the whole property in favour of strangers. In practice, however, a gift of only a portion of the landed property is allowed. Gifts may be made for *Wakfs*, which the descendants of the *Wakifs* can hold, if so devised.

The *Wakf* property can not be disposed of by the trustees except for the benefit of the *Wakf* itself.

Pre—emption: "The right of pre-emption in regard to sale of lands or houses in the towns exists. There is a custom of sale of *hava* (air), *i.e.* unoccupied atmospheric vacuum above the buildings in Zaina Kadal and Khankah Mohalla. The right of pre-emption of *hava* is held by the persons holding the lowest story, if the occupant holding the second story is going to sell it (*hava*) off. Rivaj-i-am

The sale of '*hava*' is considered unlawful according to the Shariat."

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CHAPTER III

PRELIMINARY

1. In all questions regarding succession, inheritance, special property of females, divorce, dower, adoption, guardianship, minority, bastardy, family relations, castes or religious usages or institutions, the rule of decision in this province is the personal law of the parties excepting in so far as such personal law has been modified by any custom applicable to the parties concerned.

Authorities:– Section 4 of the Jammu and Kashmir Consolidation Regulation of 1872; 8 J. & K. Law Reports page 118; 4 J. & K. Law Reports page 264.

Illustrations

1. 'A', a muslim agriculturist, dies leaving a son 'B' and a daughter 'C'. After A's death neither B nor C is in possession of his landed estate. A's property shall be mutated in the name of his son and daughter in proportion of 1 : 2 in accordance with the personal law governing the parties.

2. 'A', a muslim agriculturist, dies leaving a son 'B' and a Khana Nashin daughter 'C'. After A's death neither B nor C is in possession of his landed estate. C claims equal share with B in A's property under a custom admittedly governing the parties. A's landed property shall be mutated in the names of B and C in equal shares as claimed by C.

3. 'A', a muslim agriculturist, dies leaving a son 'B' and a daughter 'C'. After A's death neither B nor C is in possession of his landed estate. B claims the entire landed estate of his father A to the exclusion of his sister C, in accordance with a custom admittedly governing the parties under which daughters are excluded from inheritance in the presence of sons. B's claim shall prevail and A's estate shall be mutated in the name of his son B alone.

Remarks:– The intention of this section of the Jammu and Kashmir Consolidation Regulation is that the primary rule of decision in all questions relating to the matters of succession etc. shall be custom where a custom exists, and that the Hindu and Mohommadan laws shall only be applied where no such customary rule prevails. The section *does not presume* that custom is to govern the parties to the exclusion of the ordinary law, but it *prescribes* that it shall govern them in certain matters in preference to their personal law provided it is alleged and proved to exist. Even in cases where the custom contended for is so general that it may be *presumed* to exist, the person who alleges a custom contrary to some precept of his personal law is, *prima facie*,

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bound to prove that custom. The regulation of this burden depends on a rule of a procedure or evidence only in order to ascertain whether the special custom does or does not exist. The rule of decision remains the same, and its operation is *merely suspended until the ascertainment of a fact*, e.g., the existence of a custom. If a custom is proved, it must be applied to the exclusion of the personal law; if it is not, the second branch of the rule must receive effect.

For facility of easy reference, the provisions of section 4 of the Jammu and Kashmir Consolidation Regulation of 1872 are set out below in extenso :—

"The laws administered by Civil and Criminal courts of the State of Jammu and Kashmir are and shall be as follows :—

(a) The Acts for the time being in force in the Jammu and Kashmir State ;

(b) Proclamations and ordinances made and passed by His Highness by virtue of his inherent authority and for the time being in force ;

(c) The rules having the force of law made and promulgated under the provisions of any Act or Law for the time being in force in the State of Jammu and Kashmir ;

(d) In questions regarding succession, inheritance, special property of females, divorce, dower, adoption, guardianship, minority, bastardy, family relations, castes or religious usages or institutions the rule of decision *is and shall be* as follows :—

"The Mohommadan Law where the parties are Mohommadans and the Hindu Law in cases where the parties are Hindus, except in so far as such law has been by this or any other enactment altered or abolished *or has been modified by any custom applicable to the parties concerned* which is not contrary to justice, equity or good conscience and has not been by this or any other enactment altered or abolished and has not been declared to be void by any competent authority ;

(e) In questions relating to the law of Torts the state courts shall follow, so far as practicable, the British Indian Law."

under line :— should not be applied to Muhammadans. see sec. 2 & 5— Mohamadan Law. by Mulla.

The object of this section of the Jammu and Kashmir Consolidation Regulation was to settle for this province, where it was notorious that a customary law had made large inroads into the written laws of the *Sharah* and the *Shastras*, the rule of decision in questions regarding succession etc. Under the system of law which had previously prevailed in this province, it was frequently a matter of contest whether the personal law of the parties or local custom was to govern in the first instance. The

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Jammu and Kashmir Consolidation Regulation settled this debated question for the future by laying down in clause (d) of section 4 what was henceforth to be the rule of decision. The first rule was declared to be *the personal law of the parties excepting in so far as that personal law is modified by any custom applicable to the parties concerned*, which is not contrary to justice, equity or good conscience and has not been by this (viz, J. & K. Consolidation Regulation) or any other enactment altered or abolished and has not been declared to be void by any competent authority. According to this clause, therefore, Mahommadan Law, in cases where the parties are Mohommadans and the Hindu Law, in cases where the parties are Hindus, should be the first rule of decision in matters specified in the section viz., section 4 of the J. & K. Consolidation Regulation. It is evident from the sequence observed in stating these rules that the legislature deliberately intended that the *primary rule* of decision in all questions relating to the matters specified, should be *the personal law of the parties* and that the *custom should only be applied where the personal law has been modified by any customary rule.* This is made still clear by the express limitation placed on the application of the Hindu and Mohommadan Laws in clause (d) of the section by the words *"except* in so far as such law has been, by this or any other enactment, altered or abolished or has been *modified by any custom applicable to the parties concerned* which is not contrary to justice, equity or good conscience and has not been by this or any other enactment altered or abolished and has not been declared to be void by any competent authority".

The Jammu and Kashmir Consolidation Regulation applies to agriculturists as well as to non-agriculturists.

Section 4 of the Jammu and Kashmir Consolidation Regulation, making custom a rule of decision in cases where the personal law of the parties has been modified by any customary law is applicable to the *agriculturists* as well *as non-agriculturists.* There is an initial presumption in favour of personal law in all cases, whether the parties are agriculturists or non-agriculturists by occupation. Section 4 of the Jammu and Kashmir Consolidation Regulation makes no distinction between an agriculturist or non-agriculturist. It lays down a rule of decision for all classes without distinction of caste, creed, or calling, and the rule laid down is that in questions regarding succession etc., the rule of decision shall be "the Mohommadan Law in cases where the parties are Mohommadans and Hindu Law in cases where the parties are Hindus, except in so far as such law has been by this or any other enactment altered or abolished or has been modified by any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience and bas not been by this or any other enactment altered or abolished and has been declared void by any competent authority". It is thus clear that there is no initial presumption that townsmen or non-agriculturists are necessarily governed by their personal law in all

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matters concerning their family relations. The intention of the legislature seems to be that whenever parties allege and prove that their personal law has been varied by any customary rule they shall be governed by that customary rule. There exists no provision of law which might be laying down that the townsmen and non-agriculturists are to be governed by their personal law in all cases. The Hindu Law recognises custom as *'transcendent Law'*. Under this system custom stands supreme to the written text of the laws, and 'clear proof of usage will outweigh the written text of the law'.*

Custom recognised as source of Mohd. Law.

It is now established that there may be a custom at variance even with the rules of Mohommadan Law governing the succession in a particular community of Mohommadans. But the custom must be proved.† Custom is recognised as one of the sources of Mohommadan Law under certain conditions, if it is not unreasonable, nor against public policy, nor against the recognised principles of the Mohommadan Law.† In some parts of the country, customs are found to exist which are not in conformity with the general Mohommadan Law. In these parts, the courts, under their constitution, have to give effect to customs unless they are opposed to 'justice, equity and good conscience', or to any express enactment of the Legislature.¶ Where the custom set up is in derogation of and over-rides the clear provisions of the Mohommadan Law of succession, such custom must be strictly proved by very clear and definite evidence and such evidence must establish all the elements of a valid custom.*¶

Gist.

In all questions relating to succession etc., therefore, the first rule of decision is the personal law of the parties. *If the personal law is varied by any custom then the custom shall be the rule of decision.* This is the latest exposition of law made by the High Court of Judicature, Jammu and Kashmir State. If custom would have been the first rule of decision in questions relating to succession etc., then section 4 of the Consolidation Regulation and the relevant section of the Land Revenue Act would have been differently worded.

It seems that section 4 of the Jammu and Kashmir Consolidation Regulation is perhaps not so clearly worded as it might have been, but the interpretation put on it is that the rule of custom is to *be inquired into and applied first*, and that if none

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* 1924, 86 Ind. Cas. 729 All.; 1925, Ind. Cas. 385 (Allahabad); Mulla's Hindu Law page 14.

† 1922, 45 Mad. 308 at 314. ‡ 1925, 93 Ind. Cas. 135 (Bombay).

¶ Amir Ali's Hand Book of Mohommadan Law page 6 and 7.

*¶ 1924, 85 Ind. Cas. 763 (Calcutta),

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exists, the Courts are to fall back on *personal law for a guiding principle.*

Per Masud Hassan J., in Akbar Rathar versus Azizi (4 J. & K. Law Reports page 264): "It has been laid down quite clearly a number of times that ordinarily parties are governed by their personal law and the only exceptions are those in which one or the other party prove successfully that personal law is abrogated by such customs as are found to be prevailing. Per Niamat Ullah, President Board of Judicial Advisers in Ahad Lone versus Mst. Azizi :- "It is a well established rule of law and it was so held by this Board in Dewan Jewan Nath Madan versus Rasul Gadoo relying on 29 Cal 828 P. C. and 3 I. C 207 that a custom supersedes the ordinary law so for as it is proved and everything beyond the proved custom must be governed by such law. It was further held that not only each custom but each alleged separate incident of a custom must be proved to exist as customary law." Refer 8 J. & K. Law Reports page 118.

"Two main points have been urged in this appeal. The first is that according to a special custom prevailing among the parties Mst. Nawab Bibi was precluded from making a gift of her husband's property in favour of her daughter. But the existence of this alleged custom has not been established by the plaintiff. *In the absence of any special custom to the contrary the parties will be presumed to be governed by their personal law in the matters of succession.*" Refer 1937, 3 P. L. R. J. & K. section page 61.

Contrary to the rule of law laid down in this article Mr. M. A. Beg, Ex. Revenue Minister of the State, has in a number of decisions held that inheritance to landed estate in Kashmir Province is governed by custom and not the *Sharyat.* In a case cited as Abdulla and others versus Mst. Fazi (Revision application No. 101 dated 18th Har 2007 decided on 18th Assuj 2007) the Revenue Minister has held :—

"...I don't think the Wazir's view is correct. The property of Aziz had already been divided in equal shares and before him it was only the Faziz's share of Aziz's property which was in dispute. He should have, therefore, confined his judgment to that share alone. So far as the application of personal law is concerned, it is a moot question. The parties did not claim the application of that law and as universally known, inheritance to landed property in Kashmir is governed by the customary law. It would have been for the parties to establish in courts of Civil Law in case they claimed departure from the application of customary law, and a civil court would have gone carefully into that question and established if the parties were justified in seeking exemption from the application of the custom. In a revenue

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court which is an court of summary proceedings we have to administer the law governing succession to landed property according to custom prevailing in the valley..." Likewise in the case of Mst Khatooni versus Mst. Khurshi (Revision No. 86 of 28th Jeth 2007 decided on 23rd September 1952) Mr. Beg R. M. has held as under :-

"...Wazir Wazarat has decided this case, as I have said above, on the basis of personal law. According to him in matters of succession to agricultural property personal law is applicable to the parties. No proof of that fact is on record. It has been universally held in the valley of Kashmir that in matters of succession to agricultural property among Mohommadans, customary law and not the *Sharyat* law applies. In a division bench case of our High Court in which Hon'ble Justice Sir B. J. Dalal and Mr. Justice Qayum sat it was held. '...It is well established that in the Kashmir Province, Mohommadan Law does not govern the right of inheritance of Mohommadans, but such law as modified by custom governs those relations. Under the Mohommadan Law a daughter is an heir to father's estate but she is not such an heir in Kashmir Province with respect to agricultural land unless she is a Khana Nashin daughter of her father...' I have followed this principle in earlier judgments and as is very clearly brought out by commentaries on customary law prevalent in the valley of Kashmir, it may be safely assumed that as a rule custom applies in matters of succession to agricultural property in the valley of Kashmir. Wazir Wazarat, therefore, was wrong in holding that personal law was applicable to this case, particularly so when he had no evidence of that fact before him."

The sum and substance of the decisions of the Revenue Minister referred to above is that in matters of inheritance of agricultural land in the Kashmir Valley the first rule of decision is the custom and not the personal law of the parties as modified by custom as specified in section 4 of the Jammu and Kashmir Consolidation Regulation of 1977. But it is submitted with respects that the conclusion arrived at by the Revenue Minister in this behalf is erroneous and is not based on any law in force in the State. The decision of the division bench of the High Court of which reference has been made by the Revenue Minister in the case of Katoni versus Khurshi referred to above does not seem to have been properly appreciated as that ruling of the High Court clearly states that Mohommadan Law does not govern the right of inheritance of Mohommadans, *but such law as modified by Custom governs these relations.* It is, in the opinion of the author, erroneous to draw a conclusion from this ruling of the High Cout that custom governs the rights of inheritance in matters of succession to landed estate of agriculturists in the Kashmir Valley.

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It seems that at the time of issuing the rule that custom governs inheritance to landed estates in the Kashmir Valley Mr. Beg might have been influenced by the rule prevalent in this behalf in the Punjab in all questions regarding betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, any religious usage or institution, alluvion and diluvion. In Punjab, section 2, Regulation XI of 1825 and section 5, Punjab Laws Acts 1872 clearly state that the primary rule of decision in all questions relating to the matters specified above shall be custom where a custom exists, and that the Hindu and Mohommadan Laws shall be applied where no such customary rule prevails. Even in the Punjab section 5 of tbe Punjab Laws Act does not presume that custom is to govern the parties to the exclusion of the ordinary law, but it prescribes that it shall govern them in certain matters in the first instance. With a view to properly appreciate the difference in the application of Customary Law in Kashmir and the Customary Law as it is applied in the Punjab it is important to refer here the text of section 5 of the Punjab Laws Act. The section reads as below :-

"In questions regarding succession. special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations. wills, legacies, gifts, partitions, or any religious usage or institution the rule of decision shall be :-

(a) Any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any comptent authority ;

b) The Mohommadan Law in cases where the parties are Mohommadans, and the Hindu law, in cases where the parties are Hindus, except in so for as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to."

By a simple contrast of the wordings of section 4 of the Jammu and Kashmir Sri Pratap Consolidation Regulation of 1977 and section 5 of the Punjab Laws Act referred to above it will be noted that while in the Punjab custom is the first rule of decision in all questions regarding matters specified in the section and that Hindu and Mohommadan laws are only applied where no such customary rule prevails, in the Kashmir Valley in all matters specified in section 4 of the Sri Pratap Consolidation Regulation the first rule of decision is to be the personal law of the parties excepting in so far as such personal law has been modified by any custom applicable to the parties.

Caution for Revenue Officers.

It is a general practice among revenue officers of the valley

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that while attesting mutations of landed estates of deceased proprietors they pay undue importance to 'custom' and believe that lands descend in accordance with the rules of customs prevalent generally in the valley. This is a wrong notion. From the aforesaid discussion it will be obvious that the personal law of the parties should be first applied to successions in attesting mutations and when their personal law has been modified by custom to a particular extent, then and then alone custom should be made the rule for determining the heir of the deceased prepositus. Mutations are attested by Revenue Officers in accordance with two principles as are laid down in Standing Order No 23—A namely right and possession. The person who is in possession of the land is entitled to have the land mutated in his name, but he must not obviously be a trespasser. He must have a right over the land as well. That *right* must be determind by the Revenue Officers first by application of the personal law of the parties. But if the personal law of the parties be modified by a custom then custom should be made the rule to determine the right of the possession of the land to entitle, him that the land be mutated in his name.

2. Where the parties are *Hindus* and persons to whom the provisions of 'the Hindu Succession Act of 1957' are applicable, the proposition of law enuntiated in article (1) at page 49 of this book is subject to the provisions of section 4 of that Act under which any text, or interpretation of Hindu Law or any custom or usage as *part of that law* in force immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made in the 'Act' itself and any other law in force immediately before the commencement of the Act shall cease to apply to *Hindus* in so far as it is inconsistent with any of the provisions contained in the Act itself

Remark 1 :—The Hindu Succession Act of 1957 amends and codifies the law relating to intestate succession among Hindus. It supersedes the Hindu Law or any custom or usage *as part of that law*. Under section 4 of the J. & K. Sri Pratap Consolidation Regulation the law that governs the Hindus in the State is the Hindu Law as *modified* by custom. It is a matter of judicial interpretation whether the provisions of the J. & K. Sri Pratap Consolidation Regulation in so far as the rules of succession governing the Hindus are concerned is now superseded by the relevant provisions of the Hindu Succession Act of 1957 or not. The Hindu Succession Act supersedes Hindu Law and usage and custom *as part of that law*. It is to be determind whether Hindu Law as *modified by custom* is also to be superseded by the provisions of this Act. In the opinion of the author the Hindu Succession Act cannot supersede the provisions of the J. & K. Sri Pratap Consolidation Regulation of 1977 because the words

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"Hindu Law and usage and custom as *part of that law*" cannot be interpreted to mean "Hindu Law as *modified by usage and custom.*"

Remark 2 :—The provisions of the Hindu Succession Act are applicable to Hindus and persons included in the various sub sections of section 2 of the said Act namely :-

(a) to any person, who is a Hindu by religion in any of its forms or development, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj.

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person who is not a Muslim, Christian Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usages as part of that Law in respect of any of the matters dealt with herein if this Act had not been passed."

The explanation attached to sub section (1) of this section provides that the following persons are also Hindus, Bhuddhists, Jain and Sikhs by religion as the case may be namely :-

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion ;

(b) any child, legitimate or illegitimate. one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged ;

(c) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion."

Remark 3 :—The expressions "custom" and "usage" as defined in section 3 (1) part C of the Hindu Succession Act signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family.

3. Court cannot extend a custom by logical process, analogy deduction, logic, inferences or probable implications. Nor should a court give effect to a Custom which the growing consciousness, of the community is prepared to treat as unsuited to modern conditions.

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A custom is a matter of proof and not of conclusions based on a *priori* reasoning or deductions drawn from a comparative study of the laws of distribution prevailing among primitive societies.* It must be established by clear and unambiguous evidence and cannot be extended by analogy or deduced by a process of logical reasoning from another custom It is against all principles to uphold a custom by means of possible inferences or even by probable implications.† In dealing with cases in which the question involved relates to the existence of a particular custom it is not permissible to court to extend custom by logical process ‡ It is outside the province of the court to extend custom by the process of deduction from the principles which seem to underlie customs which have been definitely established.¶ Custom is not always logical and the courts should guard against the danger of seeking to extend custom by logical processes e. g. by analogy.†† It is against all principles to uphold a custom by means of possible inferences or even by probable implications.†‡

Cessat ratis cessat lex. Where a custom has originated in a family for certain reasons it cannot be said that those reasons being non-existent the custom itself should cease to exist. The principle embodied in the maxim *Cessat ratis Cessat lex* does not apply. But when in the case of Zamindari of military tenure the nature of tenure is altered, the rule of succession governing the zamindari is altered but where in a zamindari family there was a family custom of primogeniture that system cannot be wiped out by the fact that the zamindari took a new settlement †¶

Indian courts are courts of law as well as of equity and they ought not to give effect to a custom which the growing consciousness of the community in which it is said to have prevailed is prepared to treat it as unsuited to modern conditions and has allowed a departure from it in several cases. When a custom which is not in accordance with the ordinary law governing the Hindu Community is giving way to enlightenment in order to bring it in line with other communities, courts would not be justified in giving effect to it and thereby compelling the unwilling community to be bound by the custom which it has practically abandoned.‡‡ Whatever the ideas of equity, if a custom is found to exist as a fact, it will be upheld though it may appear to work hardships in some cases. The duty of the court is to find out the custom and when it is ascertained, it

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* A. I. R. 1927 Lah. 441 † A. I. R. 1946 and 65
‡ A. I. R. 1930 Lahore 695; A. I R. 1924 Lahore 243.
¶ A. I. R. 1926 Lahore 440. †† A. I. R. 1923 Lahore 175.
†‡ A. I. R. 1929 Oudh 65.
†¶ A. I. R. 1929 Cal 577 ; 118 Ind. Cas 342 D. B.
‡‡ A I. R. 1928 Mad. 299 : 108 Ind. Cas 760 D. B.

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is not against broad principles of justice, equity and good conscience to apply it. It is the custom of tribe or community to which the parties belong that is to be enquired into. It is only in cases where custom of the parties to the litigation cannot be definitely ascertained that the consideration of the general principles of Hindu law may become relevant.† If a custom is found to exist as a fact, it should be upheld even though it may appear to work hardship in some cases. The duty of the court is to find out the custom, and when ascertained, to apply it if it is not against broad principles of justice, equity and good conscience.‡

4. There is no presumption in favour of a custom and the person who alleges a custom contrary to some precept of his personal law is *prima facie* bound to prove the custom.

Explanation :— A custom prevalent in one part of the country cannot raise a presumption that the same custom is prevalent in another part of the country.

Remark 1. In all cases it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further, to prove what the particular custom is. There is no presumption created by clause (d) of section 4 of the Jammu and Kashmir Consolidation Regulation of 1977 in favour of custom. On the contrary, it is only when the custom is established that it is to be the rule of decision. The Legislature did not show itself enamoured of custom rather than law ; nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of Customary Law, nor any theory of custom or deductions from customs which is to be a rule of decision, but only 'any custom applicable to the parties which is not contrary to justice' and it, therefore, appears clear that when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply ; if he fails to do so, clause (d) of section 4 of the Jammu and Kashmir Consolidation Regulation of 1977 applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause."

Remark 2 :— The person who alleges a custom contrary to some precept of his personal law is *prima facie* bound to prove the custom. Even when a rule of custom is known to be generally and widely prevalent, or where it has been found to govern

† A. I. R. 1949 Him Pra 22.
‡ A. I. R. 1936 Pesh 116 D. B.

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a particular tribe or to obtain in a particular locality in a series of judicial decisions the fairest rule would be to leave it to be established by evidence.

In Punjab, however, in a number of decisions it has been held that when a rule of custom is known to be generally and widely prevalent, or where it has been found to govern a particular tribe or to obtain in a particular locality in a series of decisions of the Punjab High Court, it might be right to start with an initial presumption in favour of its existence.† But this rule cannot be recognised in Kashmir in view of the substantial and material difference in the applications of the two enactments one of the Punjab (Punjab Laws Act) and the other of the State (J. & K. Consolidation Regulation of 1872). In Punjab, custom is the first rule of decision in all questions relating to succession, dower, divorce etc., while in Kashmir, according to clause (d) of section 4 of the J. & K. Consolidation Regulation, in questions regarding family relations, succession, dower, divorce etc. personal law of the parties is to govern the case, excepting in so far as that personal law has been modified by any custom applicable to the parties.

Remark 3 :— According to section 102 of the Evidence Act the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Therefore, if a person alleges the validity of a custom and on the grounds of that custom claims the decision of a case in his favour, it is for him to prove its validity. If he does not prove its validity he will fail in the suit. It is, therefore, for him who alleges the validity of a custom to prove it beyond all doubts by solid and satisfactory evidence. If a party pleads a custom opposed to the generally established custom prevailing in the community to which it belongs, the onus lies upon him to prove that special custom and a solitary evidence is insufficient to discharge that onus.‡

Case law cited.

In the case of Ramzan versus Khatji decided by the Board of Judicial advisors¶ Sir Iqbal Ahmad J., observed : "A custom supersedes the personal law so far as it is established but as regards matters outside such established custom, the personal law must prevail. It is to be remembered that, in the absence of proof to the contrary, the presumption is that a person is governed by his or her personal law in matters relating to succession, inheritance, marriage. guardianship etc. and the administration of law in such matters, is enjoined by section 4 of Sri Pratap

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† 23 P. R. 1897 at page 105.
‡ 1918, 45 Indian Cases 9.
¶ 9 J. & K. Law Reports page 123 at 127.

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Jammu and Kashmir Laws Consolidation Act (IV of 1977). It follows that the very best possible evidence, and that of a high order, is needed to establish the existence of a custom in derogation of the personal law of the parties to a litigation. The more abnormal the custom pleaded, the heavier is the burden on the party alleging the same, and it is not permissible to infer the existence of such a custom simply on the basis of the existence of some other analogous custom which is not in conformity with the personal law of the parties." In another case Dewan Jewan Nath Madan versus Rasool Gadoo† the Board held. "The general principle is that the ordinary law regulates everything beyond custom. Not only each custom but each alleged separate incident of a custom must be proved to exist as customary law. Every seperate departure from the ordinary law has to be supported by evidence of a binding custom." In the case of Padam Nath Bayu versus Prithvi Nath,‡ Kilam J. held:— If a special custom is pleaded which is in derogation of the general custom followed by the general bulk of the population, it lies very heavily upon the party to prove such a special custom." In the case of Syed Hakim Ali Shah versus Nawab Bibi and others¶ it has been held that the existence of a special custom alleged by a party has to be proved by that party, and in the absence of any special custom to the contrary the parties will be bound by their personal law. Their Lordships in the course of the judgment said :— "Two main points have been urged in this appeal. The first is that according to a special custom prevailing among the parties, Mst. Nawab Bibi was precluded from making a gift of her husband's property in favour of her daughter. But the existence of this alleged custom has not been established by the plaintiff. In the absence of any special custom to the contrary the parties will be presumed to be governed by their personal law in the matters of succession." In 7 J. & K. Law Reports page 10 it has been held that a custom prevalent in one part of the country cannot raise a presumption that the same custom is prevalent in another part of the country. In another case Lala versus Rasul†† Kilam J. observed:- "Mohommadans according to the law in force in Kashmir State, have to be governed by the Mohommadan Law unless relevant provisions of the Mohommadan law are modified or abrogated by custom. It would therefore lie very heavily upon a person, who pleads a custom in derogation of the Mohommadan Law to prove its existence." The burden of proving a custom is on the person who sets it up ; the custom must be ancient and the proof conclusive. This rule must be strictly adhered to even in cases where the custom

† 7. J. & K. Law Reports page 111 at 116.
‡ A. I. R. 1957 J. & K. 53.
¶ 39 P. L. R. J. & K. section page 61, corresponding to 1937 P. L. R. J. & K. section page 61.
†† A. I. R. 1957 J. & K. 3.

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alleged is neither *unique* nor *unknown* Any person who relies on an alleged custom, has to prove that the custom exists and applies to the circumstances of the case.†

5. On failure to prove the existence of a custom under which a person would be entitled to succeed to the property of a deceased prepositus with an advantageous position than the one to which that person would succeed under personal law, it will be open to the person to fall upon personal law and claim a share in the property under that law. But it must not be proved that by a custom governing the parties that person is excluded from inheritance by some other heir and that the personal law of the parties has been superseded by custom to that extent.

Explanation 1 :—When a custom is set up by a plaintiff (muslim agriculturist) which is not admitted by the defendant and the plantiff fails to prove the existence of the custom set up by him, he is entitled to succeed under the Mohommadan law.

Explanation 2 :—If a daughter failed to establish a custom under which she claims as a Dukhtar Khana Nashin nominated *by her mother*, she is entitled to fall back upon Mohommadan Law and claim a share to which that law entitles her unless it is proved by custom that she is excluded by some other heir and that Mohommadan law has been superseded by such custom to that extent.

Illustrations.

1. 'A', a muslim agriculturist, pleads a custom and prays that she be declared to be the sole surviving heir of her father 'B' as his Dukhtari-Khana Nashin. 'C' is a collateral of 'B'. 'C' admits the existence of the custom and further adds that daughters are excluded from inheritance unless they are Khana Nashin daughters. C also says that 'A' is not a Khana Nashin daughter of her father. 'A' fails to prove herself to be a Khana Nashin daughter of her father. 'A' cannot claim the property of 'B' as his daughter under the Mohommadan law.

2. 'A', a female muslim agriculturist, pleads a custom and prays that she be declared to be the sole surviving heir of her father 'B' as his Dukhtari-Khana Nashin. 'C', a collateral of 'B' denies the existence of the custom. 'A' fails to prove herself to be a Khana Nashin daughter. 'A' can claim the property of 'B' as his daughter under the Mohommadan law and the court is competent to decree the claim of 'A' to such share of the property of 'B' as she will be entitled to get under the Mohommadan law.

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† 1926, 96 Indian Cases 836 P. C. & 1920, 56 Indian Cases 913

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Authorities :—1. Lassi versus Reshi Mir 8, J. & K. Law Reports page 117.

2. Ahmad Batt and others versus Gulam Mohamad and others, civil 1st appeal No. 9 of 2002 decided by the High Court (F. B.) on the 8th of Sawan 2002.
3. Mst. Zebi versus Resha Mir and others 4, J. & K. Law Reports page 254.
4. Rassol Lone and others versus Mst. Khurshi and another 4, J. & K. Law Reports page 257.
5. Akbar Rathar and another versus Mussamat Azizi 4, J. & K. Law Reports page 264.
6. Mst Saifa versus Mst Fatima 12, J. & K. Law Reports page 16.

Note 1.—Under section 4 of the Sri Pratap Jammu and Kashmir Consolidation Regulation (Act No. IV of 1977) in questions regarding succession, inheritance, special property of females, betrothals, marriage, divorce, dower, adoption, guardianship etc., the rule of decision is to be Mohommadan Law in cases where the parties are Mohommadans and Hindu Law where the parties are Hindus in so far as such law has not been altered, abolished or modified by any custom which must not be contrary to justice equity and good consciense. Thus according to the very words of this section, custom supersedes the personal law so far as it is established but as regards matters outside such custom, the personal law of the parties must prevail.

Note 2.—In several cases where the plaintiff has been a female muslim agriculturist, it has been a matter of great contest as to whether the claim of the plaintiff should be allowed under the Mohommadan law when she fails to establish her claim under the custom. In certain cases when a custom is set up by a plaintiff and the defendant denies its existance or does not expressly admit its existance the plaintiff is entitled to succeed under the Mohommadan law. In such cases the principle recognised will be the one which the defendant agrees to be favourable to him. But in case, where the custom is set up by the plaintiff and its existence is admitted by the defendant, the plaintiff cannot fall back upon the personal law on failure to prove the existence of the custom. Succession can be governed either by custom or by personal law and there cannot be two different and inconsistent modes of succession or inheritance. Therefore when the plaintiff fails to establish the existence of the custom set up by him and admitted by the defendant to exist, he cannot put forth Mohommadan Law as his next weapon and say that his claim be decreed under the Mohommadan law.

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Note 3:—The principle of law enunciated in this article has been held applicable to muslim agriculturists of the Kishtwar Tehsil (Jammu Province) also in a judgment of the High Court (D. B.) delivered by Mr. Justice J. L. Kilim in the case of Mst. Safia versus Mst. Fatima reported as 12 J. & K. Law Reports page 16.

Note 4 :—Answer to question number 58 of Pt. Sant Ram Dogra's Code of Tribal Custom specifies that daughters inherit *only* when they are made Khana Nashin *otherwise not*. In a ruling reported as 8 J. & K. Law Reports page 117 (Lassi versus Reshi Mir) the Board of Judicial Advisors presided over by Chaudri Niamat Ullah J. it has been remarked that answer to question 58 cannot be regarded as free from ambiguity where total exclusion of daughters is in question.

Note 5 :—The contradictory and inconsistant pleas regarding the mode of operation of inheritance must be guarded. If an advantageous position acrues to a person under custom, he can fall back upon personal law on failure to prove the existence of that custom. But if a custom is the basis of a particular legal position recourse cannot be had to personal law on failure to prove the existence of such a custom.

Case law discussed in detail.

Per Chaudhri Niamat Ullah in Lassi Ganai versus Reshi Mir †:—"It was contended in the High Court that even if the plaintiff be not regarded as a Dukhtar-Khana Nishen she would nevertheless be entitled to a share in the property left by her father or mother under Mohommadan Law. The learned Judges did not entertain that argument on a reasoning which does not appeal to the Board. The learned Judges observed :-

'It appears that some confusion exists as to whether a person who sets up a custom relating to succession can inherit under the Mohommadan Law. It is only when a custom is set up by a plaintiff which is not admitted by defendant and the plaintiff fails to prove the existence of the custom that the plaintiff would be entitled to succeed under the Mohammadan Law because no custom governing succession has been admitted or established by the parties and in the absence of any custom governing it is the personal law which would apply.'

"It seems to the Board that far from precluding the plaintiff from relying on Mohommodan law, this dictum entitles the plaintiff to fall back upon that law. She did set up a custom under which a daughter made a Khana Nashin by her mother is entitled to succeed, this custom was denied by the defendant and her claim on that footing failed. In the view expressed by the learned Judges it follows that she was entitled to claim under Mohommadan Law. In another part of the judgment the

† 8 J. & K, Law Reports 117.

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learned Judges ruled that "Succession could be governed either by a custom or personal law because their cannot be two different and inconsistent rules of succession or inheritance. It was admitted by the parties that a Khana Nishin daughter would succeed to the entire property. The plaintiff is not a Khana Nashin daughter and according to the custom stated above she would not inherit the property at all. The Board have felt considerable difficulty in interpreting this part of the judgment of the learned Judges but apparently they were of opinion as was held by the District Judge, that since the parties admitted that they were subject to customary law, the plaintiff could not base any claim under her personal law. This is a completely mistaken notion. When it is said in regard to a certain controversy relating to inheritance that parties are governed by custom it cannot be understood to imply that customary law applicable to the family is a complete code of the rules of inheritance to the total exclusion of the personal law. As was pointed out by this Board relying on Ram Nundan Singh versus Janki Kore, I. L. R. 29 Calcutta 828 P.C. that the custom supersedes the personal law so far as it is established but as regards matters outside such custom the personal law must prevail. The statute law in the state is even more emphatic. Section 4, the Sri Partap Jammu and Kashmir laws Consolidation Act (IV of 1977) lays down that the laws to be adminstrated by the courts in questions regarding succession, inheritence, special property of females betrothals, marriage divorse, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, waqf, partitions, caste or any religious usages or institutions, the rule of decision is and shall be :—

"The Mohommadan Law in case where the parties are Mohommadans and Hindu Law in case where the parties are Hindus, except in so far as such law has been, by this or any other enactment altered or abolished or has been modified by any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience and has not been declared to be void by any competent authority.

The crucial point in this case, after the plaintiff's claim based on her position as Dukhtar Khana Nishin is negatived, is whether she is nevertheless entitled to succeed as a daughter *Simpliciter.* This was the subject of issues 2 & 5 framed by the District Judge. None of the courts below has approached this question from a correct standpoint. They seem to have been of the opinion that the plaintiff could succeed as a Dukhtar Khana Nishin or not at all. This is by no means correct. If she failed to establish a custom under which she claimed as a Dukhtar Khana Nishin nominated by her mother, she is entitled to fall back on Mohommadan law and claim a share to which that law entitles her unless of course it is proved that by cus-

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tom she is excluded by some other heir and that Mohommadan Law has been superseded by such custom to that extent.

"While this should be conceded in favour of the plaintiff the Board have felt considerable difficulty in disposing of the suit on the materials before them. The defendant denied the plantiff's right to succeed under Mohommadan Law. Their plea is, however, so meager and indefinite that it can be taken to mean only that a daughter is excluded absolutely and not relatively by a person standing in a particular degree of relationship to the prepositus. It is rarely the case, if ever that a heir under personal law is excluded absolutely in the sense that he or she is under a total disability in the matter of inheritance and that the property may go by escheat to the crown or to a very remote heir, for instance a distant kindred among muslims, rather than to the heir sought to be excluded. In other words he or she is to be taken as civilly dead or is in the same position as a Hindu adopted son vis-a-vis his natural family in the matter of inheritance, where the exclusion of a daughter by custom is pleaded it is generally with reference to some other rival claimant. As a concrete illustration the facts of the present case are themselves instructive. On the death of Ghani Mir, his heirs under the Mohommadan law, were his widow (1/8), his daughter the plaintiff (1/2), the agnatic relations, the defendants (the remainder). The defendants pleaded that the plaintiff was not entitled to inherit by custom, this should be taken to mean that she was excluded either by the mother or the agnatic relations or both. It was incumbent upon them to show that such was the custom. Similarly on the death of Mst Rehmi assuming she possessed a heritable estate, the defendants meant that the plaintiff was excluded from inheriting her property by some other heir presumably themselves. As to this again the defendants ought to have established the custom of exclusion from her mother's property by her husband's collaterals. Pleadings should have been on those lines, at all events, in the alternative as it is not impossible that the custom be so drastic as to exclude a particular relation from inheritance absolutely in the sense already indicated but very cogent evidence should be insisted upon for proof of such an unnatural custom which could grow only out of feelings almost inimical towards such heir.

"Learned advocate for the defendant respondants relied on the answer to question No. 58, in Mr. Sant Ram Dogra's book on custom. The question and the answer thereto runs thus :-

Question 58. In what circumstances are daughters entitled to inherit ?

Answer :- Daughters inherit only when they reside with husbands in their fathers home, and are made Dukhtar Khana Nishin, otherwise not.

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"It is contended that the words 'only' and 'otherwise not' imply that a daughter who was not a Khana Nishin daughter was excluded from inheritance absolutely and not merely as against particular relations. A literal construction may lend support to this argument but it is extremely doubtful, to say the least, that the implications of that construction were present either to the mind of Mr. Dogra or that of the persons on whose information the custom was recorded. It is in the highest degree improbable that the answer would have been as recorded if the question had been put clearly as to whether such a daughter could not be allowed to inherit whoever else may take the property, for instance the Crown by escheat or a very distant kindred. Probably they had such relations in their mind as a widow, cousins and the like, and it may be as against such heirs that the daughter's right under Mohommadan law is not to prevail. For these reasons the answer to question No. 58 can not be regarded as free from ambiguity where total exclusion of the daughter is in question. Evidence in proof of a custom in derogation of personal law should be unambiguous."

In the case of Ahmad Butt and others versus Ghulam Mohommad and others (civil first appeal number 9 of 2002 decided by the High Court on the 8th of Sawan 2002) a full bench of the High Court held as under :-

"The question that arose on the failure of the plaintiff to establish the custom set up by them was whether they could get any share in the property in suit under the Mohommadan law. In a case reported as 43 L. R. J. & K. 135, a division bench of which one of us was a member it was decided :-

"In the absence of any specific proof of custom set up by the parties, they are presumed to be governed in the matter of inheritance by their personal law." In a subsequent case, civil 2nd appeal No. 243 of 2001, Mst. Zebi versus Reshi Mir and other, another division bench of which two of us were members it was held :-

"It appears that some confusion exists as to whether a person who sets up a custom relating to succession can inherit under the Mohommadan law. It is not only when a custom is set up by a plaintiff which is not admitted by defendant and the plaintiff fails to prove the existence of the custom the plaintiff would be entitled to succeed under the Mohommadan law, because no custom governing succession has been admitted or established by the parties and in the absence of any custom governing succession, it is the personal law which would apply.

"It is thus clear that the plaintiffs are entitled to get a share in the property in dispute under Mohommadan law, if they were heirs or residuaries of Abdulla."

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In the case of Mst. zebi versus Reshi Mir and others† a division bench of the High Court held :—

"It was further contended on behalf of the appellant that even if she were not a Khana-nishin daughter she would be entitled to a share under the Mohommadan law. It was common case of the parties that succession was governed by custom under which a Khana Nishin daughter succeeded to the entire property. Succession could be governed either by a custom or by personal law because there cannot be two different and inconsistent rules of succession or inheritance. It was admitted by the parties that a Khana-nishin daughter would succeed to the entire property. The plaintiff is not a Khana-nishin daughter and according to the custom stated above she would not inherit the property at all.

"It appears that some confusion exists as to whether a person who sets up a custom relating to succession can inherit under the Mohommadan law. *It is only when a custom is set up by a plaintiff which is not admitted by defendant and the plaintiff fails to prove the existance of the custom that the plaintiff would be entitled to succeed under the mohommadan law,* because no custom governing succession has been admitted or established by the parties and in the absence of any custom governing succession it is the personal law which would apply."

In Rasool Lone and others versus Mst. Rahmati and another‡ the same principle was recognised and it was held :-

"In this case the pleadings on behalf of the plaintiffs are inconsistent. They claim as khana nishin daughters and also plead that if they are not proved to be Khana nishin they must be given a share under the Mohommadan law. By pleading that they were Khana nishin daughters they must be presumed to admit that a custom with regard to Khana nishin daughters inheriting property prevailes in the family. If such a custom prevailes then there is no question of their getting anything if they are not proved to be Khana Nishin daughters. The defendant also admitted by implication that the custom stated above obtains among the parties but contended that the plaintiffs were not Khana Nishin daughters. There is unanimous finding of both the courts below that the plaintiffs are not Khana Nishin daughters and, therefore, they cannot claim any inheritance under that custom. In the event of the custom prevailing there is no question of the plaintiff's succeeding to any share under the Mohommadan law in the absence of proof that they are Khana Nishin daughters."

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† 4 J. & K. Law Reports page 254 & 255.
‡ 4 J. & K. Law Reports page 357.

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In Akbar Rathar and another versus Mst. Azizi† it was held by the High Court as under :-

"...There then remains the question whether the parties are governed by custom and whether Mst. Azizi is the Khana-Nashin daughter of Ali. From a perusal of the judgment of the lower appellate court it would appear that there still remains in the mind of the lower courts certain confusion with regard to the question of pleading a custom and personal law. It has been laid down quite clearly a number of times that ordinarily parties are governed by their personal law and the only exceptions are those in which one or the other party proves successfully that personal law is abrogated by such customs as are found to be prevailing in the valley. It is noticeable that the pleadings in these parts are drawn up in a lignt manner and in order to enable the parties to shift their grounds conveniently the current fashion is to say that the parties are governed both by personal law and by custom. The general form of such pleading is that the parties are *Kanoonan wa Rivajan* entitled to what they claim. This is not, however, a correct way of pleading. This difficulty will be greatly obviated if the courts confronted with this difficulty make it a rule of almost invariable practice to examine both the plaintiff and the defendant to ascertain from them as to what their position is with regard to custom. We have repeatedly laid down that custom has to be directly and definitely pleaded. It has also been laid down in clear terms that parties can be governed either by personal law or by custom but that it is not possible to countenance any conflicting claims in this behalf. In a division bench case recently decided, being Mst. Zebi versus Reshi Mir and others, civil 2nd appeal No 248 of 2001, it was remarked :- "Succession could be governed either by a custom or by personal law because there cannot be two different and inconsistant rules of succession or inheritance." In this case it will be found that the pleadings taken by the defendant that the parties are governed by Mohommadan law and are also governed by custom and that inheritance opens to Khana Nishin daughter are inconsistant, we have, however, one redeeming feature in this case that would resolve confusion as far as this point is concerned. Both the parties led evidence on the assumption that they were governed by custom and it was only on this evidence that the matter of this inheritance has been approached by both the courts below....."

In the case of Mst. Rahmi appellant versus Ahmad Lone and others (decided by a division bench of the High Court on the 2nd of Sawan 1999) the claim of the plaintiff was allowed under the Mohommadan law even when she had failed to establish

† 4 J. & K. Law Reports page 264.

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her claim under the custom. In this case the plaintiff based her entire claim on the custom but in the alternative pleaded that in case she would fail to prove her claim under the custom, her claim under Mohommadan law be decreed. The High court found that the plaintiff had failed to prove her claim under the custom but decreed her claim under the Mohommadan law. An extract from the judgment reads as under:-

"It has been found concurrently by both the lower courts as stated above, that the plaintiff was not a Khana Nashin daughter of Shaban. This finding is conclusive. She, therefore, does not get the property as Khana nashin daughter. She has as stated above also claimed the property under the Mohommadan law. It is admitted by the parties that she is the daughter of Shaban Lone. It is further admitted that Shaban did not leave any son. He left the plaintiff and his widow. On his death the plaintiff succeeded to half of the property in dispute and the widow to $\frac{1}{4}$th. The widow is dead. The plaintiff, therefore, as her daughter has succeeded to her $\frac{1}{4}$th share also. The plaintiff's share in the property in dispute is, therefore, $\frac{3}{4}$th. It is, therefore, ordered that the appeal be partly allowed, that the decree of both lower courts be set aside and the plaintiff's suit for a declaration that she is the owner of $\frac{3}{4}$th sharer in the property in dispute be decreed ....."

It is apparent that the spirit of this ruling is quite the contrary to that laid down in the subsequent decisions. There cannot be two rules of succession governing a community and it is possible for a plaintiff either to base his claim on custom or Mohommadan law. One cannot blow hot and cold in the same breath non can the court allow such an alternative relief. In the present case it seems the same position was taken up by the plaintiff and the High Court recognised the claim of the plaintiff under Mohommadan law even after holding that the plaintiff had failed to prove her claim under the custom, the extent to which this ruling can be reconciled with other reported case law on the subject shall have to be decided by reference to the pleadings in this case as well as the other facts on which this rule of law was pronounced.

Subsequently in a number of rulings, most of which have been detailed above the principle has been recognised in clear terms that when a custom is set up by a plaintiff which is not admitted by the defendant and the plaintiff fails to prove the existance of the custom he is entitled to succeed under the Mohommadan law.

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6. In Kashmir the customs are mostly embodied, not in the Wajib-ul-arz, but in the Rivaj-i-am and they are 'most valuable evidence'.

Remark 1:— In the year 1972–73 Pt. Sant Ram Dogra, Assistant Settlement Officer Kashmir, was put on a special duty and was charged with the task of the preparation of a consolidated code of tribal customs prevalent in Kashmir. To discharge this duty he toured in the different parts of the valley and made inquires on almost all questions regarding succession, inheritance family relations, dower, divorce, adoption. marriage etc. from the people. On the basis of this inquiry he compiled a code known as the "Code of Tribal Customs in Kashmir" incorporating therein the customs observed by the inhabitants of the valley on all matters concerning their family relations, succession, inheritance, adoption, dower, divorce and so on. This consolidated code of customs observed by the people of Kashmir drawn up by Pandit Sant Ram Dogra may well be called the *Rivaj-i-am* of Kashmir. This *Rivaj-i-am* is a public record and having been prepared by a public officer in discharge of his duties is clearly admissible in evidence to prove the facts entered therein subject to rebuttal.

Remark 2:— The value of enteries contained in the "Code of Tribal Custom" by Pt. Sant Ram Dogra have been accepted with varrying degrees by courts in Kashmir. In a case Lassi versus Rahmati decided by Raja Moh'd Afzal Khan Revenue Commissioner on 11th of Jeth 1995 it was remarked that what was contained in the Code of Tribal Custom in Kashmir by Sant Ram Dogra was not to be taken as a gospel truth and that the Code contained his observations on the enquiry conducted by him and that it had got no sanction of law behind it. The Board of Judicial Advisors in 8 J. & K. Law Reports page 117 did not accept the answer contained in question 58 of the code wherein *daughters could inherit only if they were Khana Nashin otherwise not.* But in a large number of decisions much reliance has been placed on enteries contained in the code. This has resulted in a mass of conflicting decisions which instead of defining and consolidating the customary law has tended much more to render it confused and uncertain.

Remark 3:— The customary law of Kashmir is an unwritten law, and the records commanly known as the Rivaj-i-am are only evidence, the value of which varies considerably as to what that unwritten law is. When based on authenticated precedents, the value of such records is great. But where the Settlement Officer charged with the preparation of such records, has 'shaped public opinion on most questions in the direction in which he himself and others of longer experience thought 'equitable', the value of

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entries purporting to expound local customs is obviously reduced to zero.

The value of the Rivaj-i-am as evidence of customary law has been laid down in a decision of a Privy Council case in Vaishno Ditti versus Rameshri† by Sir John Wallis who states :-

"It has been held by this Board that the Rivaj-i-am (or record of custom) is a public record prepared by a public officer in discharge of his duties, and under government rules; that it is clearly admissible in evidence to prove the fact entered thereon subject to rebuttal ; and the statements therein may be accepted even if unsupported by instances ; (45 P. R. 1917. P. C. Beg versus Alla Ditta ; 6 Lah 502, P. C. Ahmed Khan versus Mst Channi Bibi).

"Further, manuals of customary law in accordance with the Rivaj-i-am have been issued by authority for each district, and in their Lordships opinion stand on much the same footing as the Rivaj-i-am itself as evidence of custom.

"In these circumstances their Lordships are of opinion that even though there be no evidence of instances still, if the custom spoken to by the party's witness is in accordance with the custom applicable to his community according to the Manual of the Customary Law of the district, there is sufficient prime facie evidence of the existence of the custom, subject of course, to rebuttal, and that it ought not to be held insufficient merely for want of instances." (1928, 10 Lah 86 P. C. Vaishno Ditti versus Rameshri, followed by the Privy Council in Basant Singh's case, 1935, 57 All. 494).

In another judgment of the Privy Council‡ it has been stated that the Rivaj-i-am is a public record prepared by a public officer in discharge of his duties and under Government rules, and that it is clearly admissible in evidence to prove the facts entered therein subject to rebuttal. The Judicial Committee accepted the statement in the Rivaj-i-am though unsupported by instances. This rule has since been interpreted as meaning that where a Rivaj-i-am states that a custom of general well known applicability exists in a particular locality, it should be followed even when it is unsupported by instances, but not when the custom recorded is exceptional in character. It has now been definitely held, dissenting from previous rulings, that a Rivaj-i-am recording even a special custom (whether supported or unsupported

† 1928, 10 Lah 86, P. C.
‡ No. 45 P. R. 1917

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by instances) is a piece of evidence which, if unrebutted, is sufficient to decide the case.† In 45 P. R. 1917, the Judicial Committee referred with approval to Sir Charles Roes' "Tribal Laws in the Punjab", where particular stress is laid on the value of the Rivaj-i-am as a record of tribal customs. In accordance with the ruling of the Privy Council in 45 P. R. 1917, there is a presumption in favour of the correctness of the entry in the Rivaj-i-am.‡ This Privy Council ruling lays down that an entry in a Rivaj-i-am as to a custom (though unsupported by instances) is a strong piece of evidence in support of that custom and it lies on the person denying that custom to rebut that evidence.¶ The amount of evidence that would be required to rebut the presumption of correctness (of entries in the Rivaj-i-am) must naturally depend on the circumstances of each case.†† Statements in the Rivaj-i-am in support of a special or a peculiar custom when opposed to the general custom can carry very little weight unless supported by instances.‡‡ But this decision has now been dessented from, and it has been held that a statement in a Rivaj-i-am even of a special custom, *whether supported by instances or not* is a piece of evidence which, if unrebutted, is sufficient to decide the case.¶¶ Fforde J., while laying this principle said :-

Value of entries in Rivaj-i-am and Wajib-ul-arz :

"In 48 P. R. 1909, the Chief Court of the Punjab, from whose judgment the appeal to the Privy Council had been brought, had held that an entry in a Rivaj-i-am recording a special custom but without giving instances in support of it, was insufficient as evidence to cast the onus of rebuttal upon the side contesting such custom. Reide. J., who delivered the judgment of the court, referring to certain decisions of the Chief Court, observed : 'Four Judges of this court held that an entry in the Rivaj-i-am, unsupported by instances, does not justify modification of the ordinary custom' and again 'answer must be supported by instances to be of any value'. In dealing with this matter their Lordships of the Privy Council expressed the opinion that 'the Chief Court was in error in supposing that the defendant did not discharge the onus that lay on him of establishing the custom he alleged'. Mr. Hargopal's argument that that case is distinguishable from the present one in as much as the special custom recorded in the Rivaj-i-am in that case was not opposed to general custom, whereas in the present case it is, does not seem to me to be of any substance. In point of fact their Lordships of the Privy

† 1927. 8 Lahore 281 ; 1972, 8 Lah. 572 ; 1927, 103 Ind. Cas. 170 : 1927 10 Ind. Cas, 852., A. I. R. 1936 Pesh Page 26.
‡ 1924, Lah. 535 at page 537.
1922, 4 Lah. 102 ; 1923, 5 Lah. 274 ; 1922, 3 Lah. 184 ; 1921, Ind. Cas. 583 (Oudh)
†† 1921, 64 Ind. Cas. 264.
‡‡ 1924, 5 Lahore 364.
¶¶ 1927, 8 Lah 281 1907, 103 Ind. Cas. 170.

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Council, in the case referred to, assumed that there was a general custom among the agricultural tribes of the Punjab which was opposed to the special custom recorded in the Rivaj-i-am but was in accordance with an express exception to the general rule. I do not, however, see that it makes any difference to the principle emphasised by the Privy Council as to the value to be attached to an entry contained in a public record of this nature, that the recorded entry is opposed to general custom... The principle upon which an entry in a Rivaj-i-am is admitted as a piece of evidence conclusive of the facts stated unless rebutted, is that it is an official record kept by a person upon whom there is a public duty to make entries, and accordingly the document itself is evidence of the truth of its contents unless and until its falsity can be demonstrated by any of the various methods by which the evidential value of any public book, register, or document, may be attacked. The principle upon which their Lordships of the Privy Council relied upon the entry in the Rivaj-i-am in the case already referred to, is based upon well-established rules of the law of evidence in England which have been given statutory expression in section 35 of the Indian Evidence Act."

Entries in Rivaj-i-am may be rebutted by showing that on face of the document itself it is not a reliable record.

The observations of Fforde J., in the case reported 1927, 8 Lah., 281 that the 'entry in a Rivaj-i-am is admitted as piece of evidence conclusive of the fact stated unless rebutted', if read apart from the context is liable to be misunderstood. Whatever importance may be attached to entries as to custom in the Rivaj-i-am as evidence of such custom, they are not conclusive proof‡ (cf. 'the definition of conclusive proof' in section 4 of the Indian Evidence Act), and the statements in the Rivaj-i-am may be rebutted, not merely by proof *aliunde*, but also by convincing the Court from an examination of other portions of the Rivaj-i-am that on the face of the document itself it is not a reliable record (as for instance, that it was carelessly or imperfectly compiled or inaccurate). Where a custom as recorded in the Rivaj-i-am has no reference to the actual practice or usage in the tribe, but merely expresses the desire of the tribesmen to act in a certain manner in future on occasion arising, the entry in the Rivaj-i-am cannot be taken to prove any custom which can be recognised or given effect to. Court can give effect only to the actually prevailing usage and cannot hold such usage proved where it is expressly admitted by the persons concerned that there never has been any occasion in the past to act according to it, (A. I. R. 1849 East Punjab 225).

Remark 4 :— In the Punjab and in Oudh most valuable records of village and tribal customs, relating to the succession

‡ A. I. R. 1942 P. C. 57

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to and disposition of land have been collected under the authority of the Settlement Officers and these have been brought into relation with the judicial system by an enactment that the entries contained in them should be *presumed* to be true. These records are known by the terms, Wajib-ul-arz † A Wajbi-ul-arz being part of a Revenue Record is of greater authority than Rivaj-i-am which is of general application and is not drawn up in respect of individual villages.‡ The recent judgment of the Privy Council seems to emphasize the weight attaching to entries in Revenue Records. "Statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community."¶ They (i. e. the Rivaj-i-am or records of tribal custom) are most valuable evidence. In any case, it may be said that they are the best evidence of the kind procurable, and that the tribal representatives, whose answers have been recorded, however, ignorant or prejudiced they may be, are at any rate far superior to the partizan witnesses who would be called in each case if the records did not exist ††

7. A Wajib-ul-arz being part of a revenue record may be presumed to furnish good evidence of customs recorded therein. The weight of such evidence may be very slight or considerable according to circumstances.

A Wajib-ul-arz is by itself good *prima facie* evidence of a custom stated in it without corroboration by evidence of instances in which the custom has been enforced. The evidence as to a custom afforded by a Wajib-ul arz may of course be rebutted by other evidence ‡‡ A presumption of correctness exists in favour of an entry in the Wajib-ul-arz recording a custom. "The record on a Wajib-ul-arz of a custom is the most valuable evidence of the custom."¶¶ Where there are conflicting entries in the Wajib-ul-arz neither of which was based on any known instances, the presumption is in favour of the entry which conflicts least with general custom.†‡ Settlement Officers in recording customs in Wajib-ul-arzes have to perform duties which the Government ordered them to perform. One of these duties was to record customs as the Settlement Officers found them, *and not as he*

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† Refer Mayne's Hindu Law page 48.
‡ 1921, 2 Lah, 364 where a custom recorded in the Wajib-ul-arz of the village, of the year 1852 was followed.
¶ 1925, 6 Lah. 269 P. C.
†† Refer Roe and Rattigan's Tribal Law in the Punjab, page 37.
‡‡ 1914, 37 All. 119 P. C. ; 193, 45 All. 413 P. C.
¶¶ 1924, 81 Ind. Cas. 1033 (Oudh).
†‡ 95 P. R. 1913 at page 364.

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might think they ought to be. When it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom and it does not appear that the statement of the custom is ambiguous, the record in the Wajib-ul-arz of a custom is most valuable evidence of the custom much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.† The importance of the entry as to custom recorded in a Wajib-ul-arz, against the authenticity of which nothing is shown, was emphasized by the Privy Council in 1923, 45 Allahabad 431, which case has generally been followed and acted upon.‡ The Privy Council decision in 45 All. 413 had relation to a Wajib-ul-arz, but the principle has application to the case of a Rivaj-i-am also.¶

As regards the evidence of custom furnished by a Wajib-ul-arz, its weight may be very slight, or may be considerable according to circumstances †† As the Privy Council observed in the same case, (1910. 32 All., 363 at page 373) "there is no class of evidence that is more likely to vary in value according to circumstances than that of the Wajib-ul-arz".‡‡ Much must in each case depend upon the nature of the duty and the inquiry which preceded the record and the care taken to ascertain the facts and eliminate therefrom, pre-conceived ideas and opinions.¶¶

1923, 45 All 413 (P. C.)

It has been held by the Privy Council in 1923, 45 All. 413 that where the statement of custom in a Wajib-ul-arz is *unambiguous, the burden shifts* on the opposite party to rebut it by other evidence. The view of law accepted by the Privy Council in that case was that when a Wajib-ul-arz was unambiguous and recorded a custom in clear terms the burden shifted on the opposite party to prove by oral and documentary evidence either that no such custom existed or that it had fallen into desuetude.†‡ As has been laid down by the Privy Council, the evidence afforded by entries in records of custom prepared by responsible officials whose duty it was to ascertain and record the customs entered is valuable evidence of the existence of the customs. This decision has relation to Wajib ul-arz, but the principle has application to the case of a Rivaj-i-am also.†¶ *The Wajib-ul-arz of a village is a document of a public character,* prepared with all publicity, and must be considered as *prima*

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† 1923 : 45 All. 413 P. C. relied on in 1923, 78 Ind. Cas. 451.
‡ See 1925, 90 Ind. Cas. 323 (Oudh) : 1927, 101 Ind. Cas. 368 (P. C.) : 1927, 103 Ind. Cas. 170.
¶ 1927, 103 Ind Cas. at page 27 (Oudh).
†† 1910, 32 All. 363 at page 373 (P. C.)
‡‡ 1911, 12 Ind. Cas. 403 (Oudh).
¶¶ Sir Hari Singh Gour's 'Hindu Code' page 112.
†‡ 1925, 90 Ind. Cas. 525 (Oudh).
†¶ 1927, 103 Ind. Cas. 23 at page 27 (Oudh).

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facia evidence of the existence of any custom which it records. Its record of the existence of a custom is sufficiently strong evidence to cast on those denying the custom the burden of proof. Looking to the public character of the document, and the way it is prepared, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character†.

In the case of Uman Prashad versus Gandharp Singh‡ the Judicial committee called attention to the practice which had grown up in Oudh of allowing the proprietor to enter his own views upon the Wajib-ul-arz, whereas it ought to be an official record of customs, arrived at by the enquiries of an impartial officer. The observations of the Privy Council are relevant and impressive. At pages 21, 29 of the report (15 Cal., 20) their Lordships said :—

Wajib-ul-arz as an Official record 1887, 15 Cal., 20 (P. C.)

" ...All these things are rather emphasized by the Wajib-ul-arz, which was made at Fatteh Kunwar's instance in 1869. Before dealing with the effect of it, their Lordships wish to make some observations upon the extraordinary and startling character of that document. A Wajib-ul-arz has been considered to be an official record, of the local custom of the district in which it is recorded. It has been received before this tribunal and elsewhere as important evidence. In 1879, 5 Cal., 744 (P. C) it is stated that 'these documents are entered on record in the office. They must be taken upon the evidence, which is general evidence, to have been regularly entered and kept there as authentic Wajib-ul-arz papers'. In that case effect was given to the Wajib-ul-arz produced. In this case the Judicial Commissioner has treated the Wajib-ul-arz in question as a document of weight, which must be taken as showing local custom until some proof to the contrary is produced. But on looking at the evidence their Lordships find that this Wajib-ul-arz was the concoction of Fatteh Kunwar herself, received by the Settlement Officer as an expression of her views which she had a right to enter upon the village records, because she was proprietor of the estate. But they are not entered as her views ; they are entered as the official record of a custom. And supposing fifty years had gone by, and then a dispute arose about the family or the local custom ; this would probably have been produced from the office as an entry made fifty years ago under circumstances of no suspicion at all, and it would be taken that the Government Officers had recorded it as the local custom. And now we find deliberately stated by the Oudh Courts that the proprietor has the right to enter his own views upon the village records, and have them recorded as if they were the official records of the local

† 1490, 26 All. 549 at page 552. ‡ 1887, 15 Cal. 20.

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customs. Well, that is an exceedingly startling thing, and their Lordships think that the attention of the Local Government should be called to what has appeared in this case to have been done in one instance and may be done in other instances. It does not only render those records useless—they are worse than useless. They are absolutely misleading, because they are evidence concocted by one party in his own interest. It is to be hoped that under the Act of 1876, which empowers the local Government to make rules under which these records shall be framed, such proceedings will not take place any more."† The Privy Council in 1910, 32 All. 363 decided that where there is internal evidence that the entries recorded in a Wajib-ul-arz cannot be the views of individuals as to the practice that they wish to see prevailing rather than the ascertained facts of well-established custom, weight should be attached to the fact that no evidence is at all forthcoming of any instance in which the alleged custom has been observed.‡

The observations of the Privy Council in 1914, 37 All. 129 at page 143 are weighty and opposite :- "To hold that a Wajib-ul-arz is not by itself good *prima facie* evidence of a custom .....which is stated in it and that the Wajib-ul-arz requires to be corroborated by evidence of instances in which the custom has been enforced would be to increase the costs of litigation... Of course the evidence as to a custom afforded by a Wajib-ul-arz may be rebutted by other evidence."¶ The weight to be given to entries in Wajib-ul-arz has been considered on more than one occasion by the Privy Council. Their Lordships latest pronouncements reported in *1927, 101 Ind. Cas. 368* shows that the statement of a custom recorded in a Wajib-ul-arz of a village is good *prima facie* evidence of the custom without corroborative evidence of instances in which it has been exercised. The evidence as to a custom afforded by a Wajib-ul-arz may of course be rebutted by other evidence.††

1914, 37 All. 129 (P. C.)

8. Manuals of Customary Law in accordance with *Rivaj-i-am* stand on much the same footing as the *Rivaj-i-am* itself as evidence of custom

Remark :- The preparation of the present digest of Customary Law for Kashmir has been a voluntary act of its author and it has not been compiled under orders of any competent government authority. The work was stupendous and the digest could not be compiled without a reference to such unpublished

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† 1887, 15 Cal., 20 P. C. (Appeal from Oudh).
‡ 1914, 24 Ind. Cas. 640 (Oudh).
¶ 1914, 37 All. 129 at page 143 (P. C.)
†† See also 1914, 37 All. 129 P. C.

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rulings pertaining to custom which were burried in the sachles of the record room. The author of this work was, however, by name given permission by Mr. Justice J. N. Wazir C. J. vide Registrar High Court's number 8349 dated 4th October 1941 to consult the *unpublished rulings* of the High court pertaining to custom which rendered the task of the author comparatively easier. The conclusions regarding the customs obtaining in the valley enuntiated in the different articles of this digest are based on the reported and unreported judicial decisions of the civil and revenue courts of Kashmir in which those customs have been recognised and also the enteries contained in the *Rivaj-i-am* of the valley prepared by Pandit Sant Ram Dogra.

Authorities

Statement of custom in the customary law is in itself enough to prove a custom.† The Rivaj-i-am being a public record is admissible in evidence to prove the facts entered therein subject to rebuttal and the statements therein may be accepted even if unsupported by instances. Further, Manuals of Customary Law in accordance with Rivaj-i-am stand on much the same footing as the rivaj-i-am itself as evidence of custom.‡ A statement of custom recorded in the customary law carries with it a presumption of correctness even if it is not supported by instances.¶ The customary law does not create the custom ; it merely records the fact of its existence.†† There is a presumption that a particular rule of customary law recorded in an authorised compilation of custom is correct and the burden of proving that it is wrongly recorded or that it has since undergone a change of modification is on the party alleging it.‡‡

9. If a person leaves one district and goes into another where a different custom prevails, he carries his personal or customary law with him unless there is something to show that he had abandoned his personal or customary law of his old district.

Migration from one District to another:

The ordinary presumption of law is that when a person leaves one District and goes into another where a different custom prevails, he *carries his personal or customary law with him* and unless there is something to show that he had *abandoned* his personal (or customary) law and had adopted the law of his new District, he will continue to be governed by the personal (or

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† A. I. R. 1942 Pesh page 68.
‡ A. I. R. 1938 Pesh page 58.
¶ A. I. R. 1937 Lah 525.
†† A. I. R. 1936 Lah 418.
‡‡ A. I. R. 1936 Pesh 116 D. B.

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customary) law of his old District.† In the case of Prem Narain Haksar the custom prevalent among Kashmiri Pandits of Srinagar about an unrestricted power of widow's right of adoption was also held applicable to the Kashmiri Pandits who had migrated from Kashmir and settled in the Punjab.‡ In the normal course, a migrating family adhers to its original custom, though after complete severance from its former residence and association with people following other customs, it may gradually adopt those other customs.¶ Though persons carry their own customs with them wherever they go, it does not necessarily follow that they retain those customs unchanged after long residence among other tribes holding different customs ††

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† 1927, 103 Ind. Cas. 70. Refer also Mullas' Hindu Law, 5th edition, page 13 for a detailed list of authorities.
‡ Prem Narain Haksar's case reported in 34, 1907 P. L. R.
¶ A. I. R. 1937 Pesh 28; 168 Ind. Cas. 4100
†† 10 Ind. Cas. 387 D. B.

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CHAPTER IV

PROOF OF A CUSTOM

10 A custom must be specifically set up in the pleadings. If no custom is set up in the pleadings, the parties shall be governed by their personal law.

Custom must be set up in the pleadings.

A custom must be specifically set up in the pleadings by the parties. If no custom is set up in the pleadings, according to section 4 claused (d) of the Sri Pratap Consolidation Regulation, the parties must be *presumed to be governed by their personal law*. Per Hon'ble Chowdhary Niamat Ullah in Din Mohmad versus Karim Bibi. (3 J. & K. Law Reporter page 122) "...It is of the utmost importance that a custom relied on by a party in modification of personal law to which prima facie every family is subject *should be specifically pleaded.* It is a well established rule of law that the personal law of the prepositus is superseded only to the extent the custom is established by evidence and that a custom which is in derrogation of the personal law should be specificially pleaded and the evidence adduced in support of it, should be strictly construed..... It is only where a custom is established to be ancient, uniform and unambiguous that the personal law can be superseded by it." Per Hon'ble Pt. Shiam Krishna Dhar in Mirza Bahadur Ali and others versus Ch. Sundar Das and others (4 J. & K. Law reporter page 144 at P. 149)." .....The Board agree with the criticism of the High Court in regard to the laxity of pleadings of the appellants and in regard to the quality of the evidence produced by the appellants. It cannot be sufficiently emphasized that if a person relies upon a family, tribal or local custom in derogation of general law in support of his case *he must give full particulars of the custom in his pleadings* and if judgments and decrees and documents exist in proof of a custom or its instances these are the best proof of the custom and the person relying on the custom should produce and exhibit them ; and oral evidence cannot be a proper substitute of documents." A custom set up must be definite so that its application in any given instance may be clear, certain and reasonable. In the case of Mst. Mukhti versus Sona Bhat and others,‡ Kanwar Sain J. held : 'In this case the parties are Mohommadan and under section 4 clause (d) of the Sri Pratap Consolidation Regulation they must be *presumed* to be governed by their personal or Mohommadan Law unless indeed any custom in derogation of the Mohommadan Law

‡ Decided on the 30 of Jeth, 1986.

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is pleaded and proved. In his written statement defendant number 1 only traversed paragraphs number 3 and 4 of the plaint but did not urge any specific custom. Nor did they plead or relied on any custom. The first issue is, therefore, vague and mixed up with law and custom." Per Rachpal Singh C. J. and Masud Hussain J. in the case of Thanedar versus Maluka.† "……In a number of cases we have noticed that the courts generally do not take the trouble to find out the correct position of the respective cases of the parties in the matters of customs and the result is that there is considerable confusion during the course of the trial. When a custom is pleaded by a party to the suit then it is very necessary to find out as to the nature of the custom. The first thing which the courts must ascertain is as to what kind of custom is pleaded. *A custom set up must be definite* so that its application in any given instance may be clear and certain, and reasonable……" Per R. B. Rachpal Singh C. J. and Masud Hussain J. in the case of Akhar Dar and others versus Sultan Lon and others (Defendants):‡ "We are apprised that the plea of claiming title as Khana Nashin daughter is tantamount to plead a certain custom obtaining in the Kashmir valley under which daughters inherit the property of their father to the exclusion of his collaterals. *The general principle is that a custom has to be specifically pleaded before it can be taken into account.* But we find that the defendants accepted this custom and contested the suit only on the plea of limitation, estoppel and want of possession."

Custom admitted if not denied in written statement.

When the existence of a specific custom is alleged by the plaintiff in the plaint and the fact is not denied by the defendant in his written statement it will he supposed that the existence of the custom is admitted by the defendant.¶ In such a case it is not necessary for the court to frame any specific issue as to its existence—it being admitted by the defendant by implication.

11 Court must ascertain what the real custom set up by the parties is and not what the custom ought to be.

When a certain set of circumstances is brought before a court of law and a party relies upon a particular custom for the decision of his case, it is the duty of the court to ascertain *what the real custom is* as it exists, *and not what the custom ought to be.* The only adequate proof of a custom is clearly evidence

† Case number 35 of 1996 decided on the 11th of Magh 1997.
‡ Case number 31 of 1997 decided on 1st Bahadoon 1998, corresponding to the 28th of Jully 1941.
¶ Refer Fateh Ali versus Jewan and Hayat 1937 P. L. R., J. & K. section page 165.

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that such and such custom is followed and not merely opinions, howsoever numerous, that such and such a custom ought to be followed.† In question of a custom the issue will always be. *not 'what should be the custom'* but *'what is the custom practised.'* Per Rossignol J. "It may be admitted that what we are endeavouring to ascertain is certainly not what the custom ought to be, but what it is. But we must, at the same time, take into full consideration the fact that 'custom' is mere crystallisation of public opinion in matters affecting the social and economic life of a community, and it is not an unsound criterion of the existence of a custom whether or not it is, to any extent, in harmony with general opinion." It is, therefore, dangerous to hold that a custom which is categorically repudiated and condemned by the majority of a tribe, is actually the custom by which they are bound.‡

12. Custom should be determined not by theory but by practice. It is a matter of positive proof and not a matter of a mere inference.

Court to determine a custom not by theory but by practice

Another important factor for the guidance of a court is that it should determine a particuiar custom *not by theory but by practice,* "Theory and custom are antitheses ; custom can never be a matter of theory but must always be a matter of fact. Custom should be determined not by theory but by proctice." "In our opinion the true spirit of tribal custom is neither more nor less than the custom which is proved to exist, and should not, in coming to a conclusion on this, be swayed too much by general theories on the subject."¶ It is easy to theorize and to speculate as to what the rule of custom should be, but the function of a court in disputed custom is to discover actual practice and to give effect to it.††

Custom a matter of proof and not of inference :

Nor is a custom a mere matter of inference. It is a matter of proof and it is the evidence adduced in support of the custom set up that *can and must* alone be looked at to ascertain whether or not it has been proved.‡‡ A question of custom should be determined upon the precedents (that is instances) and other evidence adduced by the parties and not upon theoretical generalization.¶¶

Court bound to frame issue.

It is essential for a court before considering the validity of a custom to frame a specific issue to that effect. In Mashan

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† 8 P. R. 1916 at page 136.
‡ 1923, 73 Ind. Cas. 577 at page 579.
¶ Rossignol J., 1924, 6 Lah. 87 at page 92.
†† 26 P. R. 1901, at page 82, ‡‡ Campbell J. In 1923, 78 Ind. Cas. 923.
¶¶ 1922, 72 Ind. Cas. 845. †‡ Shadi Lal C J. in 1294 Lah. 87.

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and others versus Nur Din and others,† the plaintiffs whole claim was based upon the existence of a custom but no specific issue was struck about the alleged custom. The High Court of Kashmir held that the court should have examined the parties before striking the issues and a proper issue should have been framed in regard to the matter which formed the basis of the claim, be that a custom.

Validity of a custom to be proved beyond all doubts:

The validity of a custom must be proved in a court of law beyond all doubts by independent and reliable evidence. The fact that some of the witnesses make a bare assertion as to its existence is quite insufficient. Nor can isolated instances go to prove the existence of any specific custom. "A bare assertion was made by some of the witnesses of the plaintiff as to the existence of this custom. but this bare assertion is not sufficient to prove any well established custom."‡ "The custom must be proved by satisfactory evidence. Isolated instances cannot prove the existence of a well established custom."¶ The general princlple is that ordinary law regulates everything beyond custom. Not only each custom but each alleged separate incident of a custom must be proved to exist as customary law. Every separate departure from the ordinary law has to be supported by evidence of a binding custom. There can be no presumption that a custom prevalent in one part of the country may be prevalent in another part also.

In the case of Mst Bhagan versus Haveli Singh,†† it has been held by the High Court of Judicature that a custom followed by a community at large ought to be proved by independent and reliable evidence of the members of that community. In that case their Lordships remarked: "We fail to see how Mr. Thakur Dass, the then District Judge, comparing Sikhs with Shudars held that there is a custom of *Tyag* among them by which they can abandon their wives at their pleasure. There is no material on the record to hold that Sikhs are Shudras, nor is there any evidence to support the finding of the learned District Judge that the custom of *Tyag* is prevalent among Sikhs.....We are of opinion that the plaintiff has failed to establish the custom of *Tyag* prevalent among their community."

We must recognise that customary law like other law is a branch of sociology and must be in a fluid state and take

† 42 P. L. R., J. & K. section P. 49, corresponding to J. &. K. section P. 49.
‡ 40 P. L. R., J. & K. section page 47, corresponding to 1938 P. L. R. J. & K. section page 47.
¶ Laju versus Sansaroo 39 P. L. R. J. & K. section page 10, corresponding to 1937 P. L. R., J. & K. section page 10.
†† 40 P. L. R., J. & K. section page 14, corresponding to 1938 P. L. R., J. & K. section page 14.

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cognizance of progress of ethical and legal notions in the community in which it is in force † In dealing with a custom which is in course of a natural development and expansion, it is judicially unsound and indeed impossible that case law should attempt to step in and crystalise for all time the custom which exists at any particular stage of the development more than at any other. Courts have no authority to arrest the march of civilization.‡

13. A custom may be proved or disproved either by adducing *oral evidence* or by producing *documentary proof*. Oral evidence can be used to prove a custom in the following ways :—

(1) By the opinion of persons likely to know of its existence, or having special means of knowledge thereon.¶

(2) By statements of persons who are dead or whose attendance cannot be procured without unreasonable delay or expense provided they were made before any controversy as to such custom arose, and were made by persons who would have been likely to be aware of the existence of such custom if it existed.††

(3) By any transaction by which the custom was claimed modified, recognised, asserted, or denied or which was inconsistent with its existence.‡‡

(4) By particular instances by which the custom was claimed, recognised, or exercised, or in which its exercise was disputed, asserted or departed from to be ascertained from village oral traditions.

The existence of a custom may be proved by documentary evidence in the following manner :—

(1) By special reference to the enteries contained in the Rivaj-i-am and Manual of the Customary Law.

(2) By particular instances by which the custom was claimed, recognised, or exercised or in which its exercise was disputed. asserted or departed from to be ascertained from *written memorials such as the Wajib-ul-arz or the Rivaj-i-am.*

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† Chatterji J. in 110 P. R. 1906 at page 407.
‡ Pipon J. in 1922, 66 Indian Cases 853.
¶ Section 48 and 49 Evidence Act; Also refer I. L. R. XXVI Cal. page 187.
†† Section 32, clause 4, Evidence Act,
‡‡ Section 13, the State Evidence Act.

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(3) By particular instances by which the custom was claimed, recognised, or exercised, or in which its exercise was disputed, asserted or departed from to be ascertained from *Judicial decisions.*

(4) By enteries in a public record made by a public servant in the discharge of his duties *e. g.* the *mutation enteries* etc.†

(5) By the help of *Shajra Nasab or Pedegree table* which forms a part of the record of rights.

Custom how to be proved :

A custom will be said to have been proved, when after considering the matter before it, the court either believed it to exist, or considers its existence so probable that a prudent man ought to act upon the supposition that it exists ; but it will be said to have been disproved when after considering the matter before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist.‡

Oral evidence as proof of a custom :

Where oral evidence of persons, who are likely to know of the existence of a custom and who effected by it, is overwhelmingly strong in support of it, it must be accepted as *prima facie* proof of such custom, especially when it is *supplemented by valuable documentary evidence* in the nature of mutations.¶ *The* sanction of a rule of customary law *depends upon the consensus of opinion* of the body of persons to whom such law applies to be bound by the rule. The expression of opinions in such a case, if it is general, is sufficient proof of such law.‡‡ The Privy Council in the case of Ahmad Khan versus Mst. Channi Bibi†† observed : "As regards the custom in respect of which the two courts in India have differed, their Lordships think the subordinate Judge was in error in putting aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved by general evidence as to its cognizant to existence and its exercise without controversy. There is a large body of oral evidence establishing the custom wholly unrebutted by the defendants who have relied exclusively on the Rivaj-i-am. The Judges of the High Court have commented on these documents and their Lordships see no reason to differ from them .." Campell J. referring to the above decision in 1927, 8 Lahore 281 remarked that their Lordships of the Privy Council in the above case held

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† Seetion 35 of the Evidence Act; 5, J. & K. Law Reports page 190.
‡ Refer Section 4 the Evidence Act for definitions.
¶ Shah Din J. in 98 P. R. 1910 P. 355. ‡‡ 48 P. R. 1903 page 180.
†† A. I. R. 1925, P. C. 267

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that evidence by large body of witnesses in a position to know the rule of custom was entitled to weight even though no specific instances were quoted.

The question whether a particular custom does or does not prevail in any particular tribe is a matter on which tribesmen themselves are in the best position to pronounce an opinion. When questions relating to tribal custom have to be determined, the parties try to secure the evidence of the members of that tribe and even people living in the neighbourhood as regards existence and non-existence of the custom. The people of a particular community are the best and the most trustworthy repositories of the traditions which go to constitute a particular custom prevailing in that community and their evidence, therefore, is of a very great value.†

Oral evidence to be read with caution :

Mere oral evidence *unsupported by a Wajib-ul-arz or by instances* is not sufficient by itself to prove a custom.‡ "Nor again can I attach any value to the broad, general statement made by witnesses who endeavour to assist the party by whom they are called by asserting general rules of succession *but are unable to refer to precedents* in support of their assertions. Evidence of this nature (if it can be dignified by the name of evidence) is of no value and is easily procurable."¶

"It is often said that mere expressions of opinion as to custom unsupported by instances are of little or no value ; but when we find a practical unanimity on a point of custom in village after village of 14 or 15 villages and among over 100 witnesses, we think we are bound to attach much importance to oral evidence."††

Absence of specific instances in proof of a custom :

The absence of specific instances in proof of a custom are *not necessarily fatal* to its validity. A rule of custom may be established and held to be of binding force, even where no instance is forthcoming, *if there is an overwhelming preponderance of oral testimony of those governed by it* and likely to know its existence in its favour.‡‡ The proof of a custom should not be confined merely to judicial precedents and definite instances, but might consists in the deliberate and well considered opinion of the people living under and governed by the custom and other recognised modes of establishing its existence.¶¶

The rule of law as laid down by their Lordships of Privy Council is that even though there be no evidence of instances,

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† 30 P. L. R. 178 ‡ 1924, 84 Indian Cases 227 Oudh.
¶ Rattigan J. 100 P. R. 1916 page 304. †† 94 Pun. L. R. page 387.
‡‡ 55 P. R. 1903, at page 234. ¶¶ A. I. R. 1914 Lahore 306.

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a custom should not be rejected if the party's witnesses declare that it so exists and when the opposite party does not rebut the evidence adduced by the party supporting the particular custom. But in the absence of any evidence as to any particular instance or instances where a custom may have been followed, such evidence must be read with a great caution. In the case of Vishno Ditti versus Rameshware† it was observed by Sir John Wallis :—"In the circumstances their Lordships are of opinion that even though there be no evidence of instances, still the custom spoken to by the party's witnesses is in accordance with the custom applicable to his community. According to the Manual of Customary Law of the district, there is sufficient *prima facie* evidence of the existence of the custom, subject, of course to rebuttal, and that it ought not to be held insufficient merely for want of instances."

In another case‡ Bhide J. remarked :—"It will appear from the above that the evidence of the applicant is supported by two instances, exactly in point in two instances of a marriage with the widow of a nephew which may be considered to be analogous. The case of the respondents on the other hand rests entirely on oral evidence. It is true that the opinions of persons belonging to the same tribe on the question of custom are relevant in a case of this kind, *but mere opinions unsupported by instances have to be taken with caution.*"

General rule :

As a general rule, therefore, oral evidence unsupported by instances and not in accordance with the enteries of the Manual of the Customary Law of the district is not of much value, though the question in each case is as to the weight of evidence, and evidence of persons regarding the existence of a custom specially when it is corroborated by documentary evidence should not be rejected merely because specific instances have not been proved.

Instances if proved beyond doubts are sufficient proof of a custom.

Instances if proved beyond all doubts in a court of law are themselves a valid proof of a custom. An instance is that which offers itself as illustrative; something cited in proof or exemplification; a case occuring; example.¶ Evidence of instances in which a custom was claimed, recognised, or exercised, or in which its exercise was disputed, asserted or departed from can be given under section 13 of the Evidence Act. Instances in support of an alleged custom are not always to be treated as of little or no value, because supported only by oral testimony; if the deponents have means of knowledge, and the opposite party

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† 10 Lahore 86, P. C. ‡ A. I. R. 1936 Lahore 551.
¶ Refer Webster's Dictionary.

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makes no attempt to rebut facts stated may be accepted as proved.†

Numbers of instances required to prove a custom:

No hard and fast rules can be laid down as to how many instances are sufficient to make out a valid custom. "There should, however, be such a multiplication or aggregation of instances as is sufficient to establish a tangible recognition of the custom as obligatory. A single instance cannot prove a custom, nor are a few instances of a modern date sufficient to prove a custom in derogation of ordinary law.‡ But the fact that there have been in the village a large number of instances, relating to a point of custom increase their value. The antiquity of instances, that is to say, the fact that the custom may exist from a long time is of sufficient importance in proof of a custom.¶ Instances whether sufficient to establish custom is a question of law. (Refer Civil Procedure Code S. 100.)

Uncontested cases:

"Uncontested cases are good proof of an alleged custom, for the greater the strength of the custom the less probability is there of any body attempting to controvert it."†† The fact that no contest has taken place in the past may well raise a presumption that the custom was so well recognised, that no one thought of contesting it.¶¶ Per Robertson J. in 15 P. R. 1906:— "The very best possible evidence of a custom is that which shows that it has been followed consistently in a number of instances without any dispute."

Admissions in proof of a custom.

Oral evidence may be adduced to prove an admission in proof of a custom. An admission on a pure question of law is usually inadmissible against a person making it ; but an admission on a question of tribal custom is not an admission of a pure question of law, and is a valuable piece of evidence against the person making the admission.

"No doubt an admission cannot be treated as an estoppel and it is always competent to the person who makes an admission against his own interest to come forward and to explain to the court the circumstances under which he had made the admission and to give his reasons why it is not binding upon him. But if an admission against his own interests is made in unequivocal terms by a party in respect of a matter in which he is directly concerned and he omits to give any explanation, then that admission can certainly be used against him, for as has been laid down by the highest authority, a man's admission, if unexplained

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† 29 I. C. 382, corressponding to 1915 Lahore 225.
‡ 82 I. C. 815. ¶ 71 P. R. 1904.
†† 1925, Lahore 124 . ¶¶ 1922, 72 I. C. 845

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is the best piece of evidence against him." An admission to be effective should have been made under no misapprehension of custom or law applicable to the case.

Custom proved by transaction,

Under section 13 of the Evidence Act a custom may be proved by any transaction by which the custom was claimed modified, recognised, asserted, or denied, or which was inconsistent with its existence.

Transaction explained.

Transaction in its ordinary acceptation signifies the conduct or management of any undertaking or business affair ; any matter or thing that has been brought partly or wholly to a conclusion ; any act affecting legal rights or obligations.† The word "tranctions" as used in section 13 of the Evidence Act means a business or dealing which is carried on or transacted between two or more persons. Written statements filed in suits are not transactions within the meaning of section 13 E. A. Where in specified boundaries of an adjacent land the suit land is described as belonging to one of the parties, it is a transaction but not a transaction in which the right of the party is asserted, claimed, or even recognised and hence is not admissible in evidence under section 13 of the Evidence Act.

The word "claimed" implies a demand which involves the presence of the party against whom such demand is made and who may have an opportunity either to comply with it or refuse it. A bare statement may or may not be "claim" according to the attending circumstances in which it is made. An "assertain" may be by a statement as well as by an act and a verbal assertion of a right not accompanied by any act would be receivable if from the attending circumstances it amounts to a "claim."

The statements of persons who are dead or whose attendance cannot be procured without unreasonable delay or expense, provided they were made before any controversy as to such custom arose, and were made by persons who would have been likely to be aware of the existence of such custom if it existed, can be relied upon under section 32 (4) of the Evidence Act in proof of a custom, and it is essential that such statements must have been made *anti-litum motum i. e.* before any controversy as to the existence of such a custom arose. Statements made *post litum motum* are, therefore, not relevant under section 32 (4) of the Evidence Act.

Judicial decision in support of a custom.

The evidence afforded by decision of the courts in the enforcement of a custom is the most satisfactory. But a decree which does not bind the parties as *res judicate* is a mere piece of evidence capable of rebuttal. It does not necessarily prove a custom. The

† Refer Standard Dictionary.

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Madras High Court has attached weight to decisions of *Panchayats* even. Judicial decisions recognising existence of a disputed custom among the community of one place are very relevant as evidence of the same custom among the same community of another place, but the evidence that the usage has application to the particular case cannot be dispensed with. (Refer Sarkar's Evidence Act page 107). A judgement based on compromise setting out the terms in the form of a recital has been held to be a record of transaction by which the rights of the parties were recognised and therefore relevant under section 13 of the Evidence Act.

Where the local custom is sought to be proved by Rivaj-i-am and the munual of the customary Law, the compilers remarks in the manual, where they are not in derogation of the custom referred to in the answers and where they also give the opinion of the compiler regarding the scope of the question should not be ignored. The compiler being the person who framed the question and presumably also put it to the tribes, his opinion is entitled to considerable weight.† The fact that in the instances cited in support of a custom the District Judge had followed merely the custom recorded in the rivaj-i-am, though there were no instances placed before him by either party does not affect the value of the instances. Also cases decided long ago, in accordance with the custom then prevailing and recorded in the rivaj-i-am then current are of no value in deciding the custom existing in later times when the custom had changed and the change is recorded in the rivaj-i-am ‡ Mutations may not be evidence of title, nevertheless they are evidence of conduct of persons and may be quoted in support of a family custom.¶.

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† A. I. R. 1942 Lah 164 ; A. I. R. 1949 East Punjab 35.
‡ Harries C. J. and Mahajan J. in Bui versus Bela Sing. A. I R. 1947 Lahore 33. ¶ 5 J. & K. Law Reports page 190.

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CHAPTER V

REQUISITES OF A VALID CUSTOM.

14. A custom to be valid must be:—

(1) Reasonable and not immoral ;†

(2) Ancient and invariable ;‡

(3) Continuous and uniform ;

(4) Certain and definite ;

and must not be :—

(1) Opposed to public policy :

(2) Contrary to justice, equity and good conscience ;

(3) Contravening any express law ; and

(4) must not have been declared void by any competent authority before the passing of the Jammu and Kashmir Laws Consolidation Regulation ; *i. e.* before the 11th of September, 1910

Illustrations.

(1) A custom applicable only to respectable Baluchis and Sidars is too indefinite, and as such cannot be enforced in a court of law.

(2) A custom overriding the provisions of the Limitation Act is invalid.

(3) A custom which is prejudicial to a class but is beneficial only to a particular individual is invalid for unreasonableness.

(4) A custom whereby the sale of wives is permitted in a particular tribe is invalid for being immoral.

(5) A custom that lands shall descend to the most worthy of the owner's blood without making any provision as to how the selection is to be made is void for uncertainty.

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† III J. & K. Law Reports page 122 ; A. I. R. 1946 Oudh 65 ; A. I. R. 1937 Cal 46 ; A. I. R. 1929 Rang 300 ; A. I. R. 1927 Mad 73 ; A. I. R. 1958 Sind 24.

‡ 7 J. & K. Law Reports page 11.

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(6) A custom that if a widow gives birth to a son within the four walls of her husband's house (*Thum Puther*) would be considerd a son of the deceased husband how many years early he might have died cannot be enforced as immoral.

Authorities :—Section 5, Jammu and Kashmir Consolidation Regulation; and the cases discussed in this chapter.

A custom to be valid must be reasonable and hence the first essential ingredient of a valid custom is that it must not be *unreasonable nor immoral.* In considering whether a custom is reasonable or unreasonable we should not be influenced or guided by modern ideas, for, that which appears to be unreasonable to us now may have been considered as eminently reasonable and necessary in bygone ages.* Where the validity of a custom is challanged on the ground that it is against reason, the reason referred is not to be understood as meaning every unlearned man's reason but artificial and legal reason warranted by authority of law. Consequently when it is said that a custom is void because it is unreasonable, what is meant is that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial must have resulted from accident or indulgence and not from any right conferred in ancient times. *The test applied is whether the custom could have a lawful beginning (commencement)*† and the period for ascertaining whether a custom is reasonable or not is the period of its inception. A custom which any honest and right minded man would deem to be unrighteous is unreasonable.

When there is nothing unfair or dishonest or contrary to public good in a custom, the custom is not unreasonable.‡ A custom would be unreasonable if it would destroy the subject matter of the right.¶ No right to the user of a public property can be acquired by custom if such user amounts to a public nuisance, such a custom being unreasonable.†† A custom prejudicial to a class and beneficial only to an individual is repugnant to the law of reason. The reason in this contest is not very unlearned man's reason but artificial and legal reason warranted by authority of law.‡‡ But a custom of *Dhadwai* (a sole right to weigh and measure customers for commodities imported into a market) is neither unreasonable nor opposed to public policy.¶¶ On the other hand a custom entitling villagers to cut wood

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* 1927, 51 Mad. 25. † 1917, 45 Cal. 475; A. I. R. 1927 Mad. 131; A. I. R. 1937 Cal. 245; A. I, R. 1921 Pat. 90. ‡ A. I. R. 1916 Cal 67.
¶ A. I. R. 1934 Cal. 851. ‡‡ A. I. R. 1918 Cal 326.
†† A. I. R. 1924 Pat 303 ¶¶ 1926; 98 Indian Cases 759.

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from neighbouring village for repairs of water ways ;† and a custom for the digging and taking earth if not destructive of subject matter‡ have been held to be valid customs.

It is to be noted that the test to be applied is that the custom *should not be unreasonable, and not that it should be reasonable.* Many customs which though they may not appear to be reasonable may not be unreasonable either. The court is bound to recognise such customs on the ground that it is not unreasonable and under no circumstances whatsoever can it be rejected for not being reasonable.

It will simply be defeating the ends of natural justice to recognise a custom which is immoral in its outset. Such a custom being against public morals should not be recognised by a court of law even if it be established by a satisfactory evidence to exist. In the case of Gokul Chand versus Mst. Romalo and Mst. Bandan,¶ the Kashmir High Court refused to recognise a custom which enabled a person to treat a woman as his wife on the ground that he had paid an amount of money to the woman's mother. Their Lordships said :- "The plaintiff did not allege any marriage or *Chadar Andazi* with Mst. Romalo but merely claimed that as he had paid a certain amount of money to Mst. Romalo's mother he was entitled to keep Mst. Romalo as his wife according to the custom of the Illaqa in which the parties lived. In the first place no such custom has been satisfactorily established but *even if the existence of any such custom was proved that custom being against moral cannot be acted upon"* In the case of Ghasita versus Umroa Jan,†† the Privy Council refused to recognise a custom among a Mohommadan community or tribe called Kanchans for a family to be maintained as a joint family out of the wages of prostitution earned by the female members and to recruit itself on the female side by adoption.

In another case, before Sir B. J. Dalal C. J. and Mr. Justice R. B. Sawhney (Bankoo and others versus Teju and Kalu)‡‡ the illegitimate sons of one Mst. Shibu sued for possession on the ground that on the basis of a custom they were entitled to succeed to Shibu's property. The learned District Judge held that if a widow gives birth to a son within the four wall of her husband's house, the son would be considered a son of the deceased husband how many years early he might have died

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† 31, P. R. 8. ‡ A. I. R., 1924 P at 308.
¶ 39 P. L. R., J. & K. section page 39; corresponding to 1937 J. & K. Rulings page 49.
†† 221 Cal 149.
‡‡ 388 P. L. R., J. & K. section page 47, corresponding to 1936 J. & K. section page 47.

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But in appeal their Lordships reversed the decision of the learned District Judge and held ....."We expect that the District Judge means that if the son happens to be born suddenly a few yards away the custom would not apply. The custom which has struck the District Judge as exceedingly reasonable and normal is flagrantly immoral. It is an incentive to widows to take to prostitution. The parties belong to Thakur class and whatever the rank of that class may be in the scale of society, a court of law should not countenance a custom averring prostitution in any class of human beings who in the nature of things are supposed to be higher in scale than beasts. The custom is immoral and the trial court took correct view of it." It will be recalled that the sons of Mst. Shibu claimed succession to the property of shibu on the ground that they were the *Thum Puthur* of mst. Shibu. But their Lordships ruled out the claims of the *Thum Puthur* as valid on the ground that such a custom was highly immoral and hence could not be recognised in law. Likewise in the case of Laju versus Sansaroo and Chhunkoo† their Lordships, Abdul Qayoom C. J. and Kichlu J. said: "We are surprised to read the judgment of the lower appellate court's finding that although Mst Sansaroo was at first the wedded wife of the plaintiff, she was subsequently sold to Chhunkoo for a sum of Rs. 100/- and that according to the special custom prevalent among the Jewars of Jammu this sort of sale of wives is permitted. The custom alleged is most immoral and its existence has not been established by satisfactory evidence." A custom permitting a woman to leave her husband without his permission and contract a second marriage during his life time is not enforceable as being immoral.‡ A custom by which divorce and re-marriage are permissible on mutual agreement on one party paying to the other the expenses of the latter's original marriage is not immoral in its nature.¶ Likewise a custom is not immoral merely because it regulates rights of property amony dancing girls.††

"The principle of the decision of the Privy Council in the case of Ghaista versus Umroa Jan‡‡ appears to be that customs which are immoral according to British notions can only be recognised, if at all, on clear proof that they are not immoral according to the general principles of the religion professed by the body of persons seeking to maintain the custom.¶¶

In the words of Littleton : "No custom is to be allowed but such custom as hath been used by *title of prescription*, that is to say, *from time out of mind*. So "no usage can be part of law, or

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† 39 P. L. R., J. & K. section page 10, corresponding to 1937 P. L. R. J. & K section page 10.
‡ 1914, Mad. page 1144 at usage 1151. ¶ 21 Cal. 149.
†† 4 Bomb. 545. ‡‡ I. L. R. 11 Bomb. 140 ¶¶ I. L. R. 17 Mad. 479.

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have the force of custom, that is not immemorial."† "A custom originating within time of memory even though existing in fact, is void at law."‡

If a custom has been in existance for a long series of years, it cannot be extinguished by non-user. The fact that it has not been exercised for a long period may be reason for doubting its existence but that fact cannot be said to have put an end to it.¶ In Re Sivanani Perumal versus Mattu Ramalinga their Lordships of the Privy Council affiirming the judgment of the Madras High Court made the following remarks :—

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages modifying the ordinary law of succession, *that they should be ancient and invariable*; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends"

Customs should be ancient, uniform, reasonable, certain, consistent and not immoral. It is ancient if it has existed *'so long that the memory of man runneth not to the contrary'*.†† Valid custom must be immemorial, reasonable, certain and continuous ‡‡ "A custom to be legal must, therefore, be proved to have been in existence for a time preceding the memory of man. It not always being possible to obtain such proofs, the courts have invariably been *willing to presume* the existence of a custom for such a period provided that evidence is produced which proves that the custom has been followed as far as living testimony can establish." ¶¶

A family custom need not be immemorial, but it must be ancient and exact and ought to be clearly established by convincing evidence. "The only question of law which can be said fairly to be raised by this appeal is academic namely, whether the Privy Council in the case of 1917, 45 Cal 450 really said that a custom should be immemorial. I do not think they said that It was recognised that the rules regulating custom in India are very different from those in England. At any rate there was no Richard the First in India and these family customs in India

† Millor versus Taylor, 4 Bomb 2305. ‡ Wills J. in L. R. H. L. page 239.
¶ A. I. R 1919 Oudh 397, 52 Indian Cases 869. †† 5. I C. page 19
‡‡ 37 I. C. 960. ¶¶ A. I R. 1937 Lah. 452.

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are somewhat special. But the case in question does decide that they must be ancient and exact."†

"There is in this province no rule of law which prescribes any period during which a custom in order to be valid and enforceable must have been observed. It is sufficient to show that the custom actually prevails and is generally observed in the tribe to which the parties belong and there is no necessity to go further and attempt to prove the impossible that it has been preserved in the tribe from a period *to which the memory of man runneth not to the contrary, the uniformity of practice.*"‡

A custom must have continued without interruption since its immemorial origin. "The fact that a custom has not been exercised for a long period may be a reason for doubting its existence though the fact cannot be said to have put an end to it."¶ "When a custom is interrupted for sixteen years, it ceases to exist †† But the mere non exercise of a discretionary right existing by custom, in certain cases, does not necessarily prove that the right has been abrogated by a different custom.‡‡

Per Rachpal Singh C. J. and Massud J. in the case of Thanedar versus Maluka :¶¶ "In a number of cases we have noticed that the courts generally don't take the trouble to find out the correct position of the respective cases and the result is that there is considerable confusion during the course of the trial. When a custom is pleaded by a party to the suit then it is very necessary to find out as to the nature of the custom. The first thing which the courts must ascertain is as to which kind of custom is pleaded. A custom set up must be *definite*, so that its application in any given instance may be clear and certain and reasonable..."

In order that a custom may be a valid custom it must in addition to being ancient and invarriable, reasonable and not immoral, continuous and uniform, also be *certain and definite.* A court cannot recognise a custom which on account of its uncertainty and indefiniteness fails to express the real intention with regard to its subject matter. "It must be certain with respect to its nature generally as well as in respect to its locality where it is alleged to obtain."†‡ "A custom must be certain as to the person or class of persons who are to be affected by it. Thus a custom applicable only to 'respectable Baluchis and Sidars' is

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† Per Waish J. in 1926, 93 Ind. Cases. 363. ‡ 34 P. R. 1907.
¶ 52 I. C. 869. †† 52 P. R. 1868. ‡‡ 125 P. R. 1879.
¶¶ 43 P. L. R. J. & K. section page 130, corresponding to 1941 J. & K. section, May, page 130. †‡ 42 Cal. 455, corresponding I. C. 403.

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is too vague and invalid one."†

A custom that lands shall descend to the most worthy of the owners' blood without making any provision as to how the selection is to be made is void on the ground of its being uncertain. Also a custom to throw earth and stones in heaps upon land near a certain place offends against the rule of a custom to be definite and is bad for its uncertainty.‡ On the same ground to contribute towards a fund according to one's own pleasure is void for similar reasons.

Cases cited :

A court has no jurisdiction to recognise a custom which cannot clearly express its true intention as regards its subject matter or the class to which it refers to. It will then be merely guessing as to what the custom might be or ought to be and not recognising any existent custom. It is no business of the court to determine what the custom ought to be, *in which case it could determine the true nature of a custom,* nor is it any business of the court to determine what the custom might be, *in which case it could determine the uncertainty and indefiniteness of a custom,* but the court must determine as to what is the existing custom and recognise it.

Custom not to be opposed to public policy ;

In the words of Chief Justice Hobart in Janson versus Driefoutein Consolidated Mines:¶ 'Public policy is always unsafe and treacherous ground for the legal decision and is an unruly horse'. "The courts are not concerned with public policy and it is only where a custom, not altered or abolished by Statute or competent authority, is contrary to justice, equity, and good conscience that they are at liberty to reject it as a rule of decision." observed Mr. Justice Coldstream in Mst. Sardar Bibi versus Haq Nawaz Khan.†† In Fender versus St. Johan Mildmars,‡‡ the House of Lords held by a majority that a promise made by a married man against whom his wife had obtained a decree *nisi* dissolving the marriage, to marry another woman when the decree was made absolute, was legal and enforceable and not opposed to public policy. The doctrine of public policy should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.

Jai Lal J.¶¶ "I am not disposed to place much value on this statement of a solitary witness to prove a custom of such

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† 16 I. C. 341. ‡ 1 Wills 63.
¶ 1902 Appeal 484 at page 500. †† A. I. R. 1934 Lahore 371.
‡‡ Rattigans, Digest of Punjab Customs, 12th edition, page 66.
¶¶ A. I. R. 1928 Lahore 371.

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importance and in any case would be disposed to hold that such a custom if proved is opposed to public policy and is immoral and consequently invalid in British Indian Courts."

"When a person has been murdered with the sole object of securing his property, the murderer as well as his sons are excluded from inheriting the property of the deceased notwithstanding that it is ancestral property, as their succession would be opposed to public policy. The murderer's right in such a case is swept away and with it is carried away the right of every one who claims through and not merely from him.† In another case‡ it has been held that the question whether the direct lineal descendants of a murderer are to be allowed or not, to benefit by his crime, is not one to be decided on principles of either Hindu, Mohommadan, or Customary Law *but on public policy and justice.* But the brother of murderer is not debarred from succeeding to the murdered person's property.¶

Custom must not be contrary to equity, justice, and good conscience.

A custom which is primarily contrary to the rules of equity, justice and good conscience cannot be recognised on the grounds of public policy, as a valid custom. All customs which are unreasonable, or immoral are not recognised as valid customs because they are against the principles of equity, justice and good conscience. But there may be many other customs which even though they may be reasonable and not immoral may yet be against the recognised principles of equity, justice and good conscience. Such customs are also to be necessarily excluded and the courts should not recognise them as valid customs on any other grounds whatsoever, however reasonable that ground may appear to be. All law courts in India are courts of equity and where there is no express provision of law existent for the determination of a dispute, courts decide such cases on basis of the rules of equity. On the same ground customs which are not in accordance with the principles of equity, justice and good conscience cannot be recognised as valid customs.

Section 5 of the Jammu and Kashmir Laws Consolidation Regulation of 1977, as amended upto date, runs as follows :—

"All customs and mercantile usages shall be regarded as valid unless they are contrary to justice, equity and good conscience or have been, or shall be declared to be void by any competent authority."

It has been held†† that a custom whereby the proprietors

† I. L. R. 3 Lahore page 103 ‡ 1922, 3 Lahore page 242.
¶ 69 P. R. 1919. †† 27 P. R. 1882.

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are entitled to one fourth of the proceeds of sales of houses in villages as proprietory dues, is not contrary to justice, equity and good conscience.

Custom should not contravene any express law :

The words "or have been, or shall be declared to be void by any competent authority", used in section 5 of the Consolidation Regulation imply that for the validity of a custom it is essential that it should not have been declared void by any express provision of law having an authority to declare it so.

Thus a custom declaring tenants at will from claiming compensation for improvement contrary to the terms of the Punjab Tenancy Act is not valid†. Similarly a custom overriding the provisions of the Limitation Act is also not valid.‡

Custom should not have been declared void :

Custom must not have been declared to be void by any competent authority before the passing of the Jammu and Kashmir Laws Consolidation Act of 1977. The words "and has not been by this or any other enactment altered or abolished..." used in section 5, sub-section I, clause (d), second para, require that the custom should not have been abolished by any authority before the passing of the Jammu and Kashmir State Laws Consolidation Act. The Jammu and Kashmir Laws Consolidation Act came into force on the 11th of September, 1920. All local customs and mercantile usages which were declared to be void by any competent authority before that date must not be regarded as valid.

Custom to be obligatory or compulsory :

A custom to be valid must be consciously accepted as having the force of Law.¶ A caste custom which is against law ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as binding.††

15. A custom can be abrogated by consensus of opinion among the members of the community and if for a considerable period that feeling continues in the community and they act according to it and do not follow the old rule, the old custom can certainly be abrogated,

Abrogation :

A custom may be abrogated and if it is so abrogated it ceases to exist. It is obvious that it is the will of the community that establised a custom and similarly it is the will of the community that abrogates a custom and for that abrogation of a custom long and continuous usage is not legally essential. As

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† 73 P. R. 1870.
‡ I. L. R., 3 Bomb 174.
¶ Mira Bibee versus Vellayamma, 9 M. 464,
†† 16 B. 470, Patal Vendra Van versus Patal Mani Lal.

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observed by Robertson J. in Daya Ram versus Sahel Singh:† "We must also recognise that customary law, like other law, is a branch of sociology and must be in a fluid state and take congnizance of progress of ethical and legal notions in the community in which it is in force." A custom can, therefore, be abrogated by consensus of opinion among the members of the community and if for a considerable period that feeling continues in the community and they act according to it and do not follow the old rule, the old custom can certainly be abrogated. (A. I. R. 1947 Lah. 233.)

"A long established custom cannot be abrogated by a mere declaration. The abrogation is to be inferred from continuous course of conduct. It is not open to an individual, whose family or tribe had for generations followed a custom to suddenly give up that certain custom by merely making a declaration to that effect. The abrogation is to be inferred from a continuous course of conduct. Hence it is not open to a man at his pleasure to change the rule of succession to his property to the detriment of those who would have been hitherto governed except of course in so far as that law allows him to do so by making last will and testament."‡

Abrogation by a community :

Per Jai Lal, J. "In my opinion it is possible for a community to abrogate a custom in favour of a personal law by a unanimous resolution and if we were to insist on a long and continuous course of conduct before accepting the resolution as enforceable in our courts then there is bound to be an interval in which the question will remain in a state of uncertainty which is not desirable or even contemplated. Custom after all is manifestation of the will of a community and the members of the community are bound to obey such will, but as a rule of prudence the courts will not enforce it unless its manifestation is accompanied by long usage···Similarly the collective will of the community can abrogate the custom ; and when the custom is abrogated, then necessarily the personal law becomes enforceable. It would further be difficult, as I have observed, if it is decided by a community to establish a fresh custom in place of the abrogated custom, in which case before the new custom can be enforced by the courts the decision of the community must be accompanied by long and continued usages."

A particular rule of descent prevailing in a family may be destroyed by discontinuance." Where a custom is proved to exist that custom must be held to continue and the onus of proving discontinuance or that the custom had fallen into desuetude lies

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† 110 P. R 1906. ‡ A. I. R. 1934 Lahore page 371.

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upon the party asserting it.† Although by a custom a particular requirement of personal law is dispensed with or varied, the personal law does not as a consequence cease to have any application to the case. If a party avers that the variation by custom of the personal law in one respect has the consequence of abrogating that law altogether, then the party must also prove the existence of a custom justifying such a result.‡

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† I. L. R. Cal. 186. ‡ 1931, 132 I. C. 804 (Allahabad).

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CHAPTER VI.

DUKHTARI KHANA NASHIN

Introduction :

Artificial kinship is a well recognised and widely practised mode of strengthening societies. By means of artificial kinship strangers are adopted into a clan or kindreds. Various methods are employed for this purpose of which the most celeberated in the valley is the institution of Dukhtari Khana Nashin, or the recognition of a Khana Nashin Dukhtar as an heir of the status of a son. The main object of having the system of a Khana Nashin daughter is to preserve all outside grafting on a stock whose male descendants have exhausted and to preserve the devolution of the property into the hands of a relation who is connected through a direct line of descent, whether male or female to the ancestor. In many families where the ancestor has no male lineal descendant and possesses only a daughter, the usual way employed for the purpose of continuing the clan is to marry the daughter at home and bring a husband into the family for her. This system of having a daughter at home along with her husband is at present resorted to by almost all the Mohommadans of the valley and instances are not wanting in which the Hindus and the Sikhs of the valley have also made their daughters as Dukhtari Khana Nashin. Some pandits in the valley have made their daughters as Dukhtari Khana Nashin even in preference to having adopted sons for themselves. The law of adoption being strictly prohibited by the Mohommadan Law, the Mussalmans of the valley invariably resort to the making of their daughters as Dukhtari Khana Nashin instead of having adopted sons for themselves.

Origin :

The institution of Dukhtari Khana Nashin has got its origin in strict Hindu Law as was followed in India in the ancient times. It is a well known fact that the old Hindu Law recognised not less than fourteen different sorts of sons one of whom was called the *Putrika Putra i. e.* the appointed daughter's son. This son ranked next after the legitimate son (*Aursa*). Even though a Hindu could not under the strict Hindu Law adopt his daughter's son, yet a son born of a daughter appointed by her father for the purpose of raising a son for him, was recognised as a son ranking next after the legitimate son of the father (*Aurasa*). The institution of Dukhtari Khana Nashin may, therefore, well be described as the appointment of a daughter to bring male issues for a person who has no such male issues of his own. It will not be out of place to mention here that the position assigned to an adopted son (*Dattaka*) is tenth in the list of sons recog-

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nised by the old Hindu law. But at present an adopted son ranks next after the (*Aurasa*) legitimate son of a person in the different sorts of sons that are recognised at present. This is due to the fact that other kinds of sons that were recognised by the old Hindu Law are not recognised as such at present.

The custom of the institution of a Dukhtari Khana Nashin in Kaskmir has not merely been recognised in judicial decisions of the highest courts in the state but the recognition of the rights of a Khana Damad and the mode of effecting mutations in favour of Khana Nashin daughters' have found its place in the Jammu and Kashmir Tenency Act, and the Revenue Department Standing Order No. 23 A prepared by the Revenue Minister by virtue of the powers vested in him under section 43 of the Jammu and Kashmir Land Revenue Act No. 1 of 1980. Under Section 33 clauses (e) and (f) of the present Land Revenue Act (No. 11 of 1996) the Government is competent to make rules regulating the procedure of Revenue Officers under the said Act in cases for which a procedure is not prescribed by the Act itself and generally for the guidance of revenue officers and village officers in matters pertaining to records and registers mentioned or referred to in the Act itself. No rules have been prepared by the government by virtue of the powers vested in it under this section. But section 2 of the Act (Jammu and Kashmir Land Revenue Act No. XII 1996) provides that all *rules*, appointments, assessments and transfers made, notifications and proclamations issued, authorities and powers conferred farms and leases granted, records of rights and other records framed, revised or confirmed, rights acquired, liabilities incurred times and places appointed, and other things done under any of such rules and others, shall so far as may be, deemed to have been respectively made, issued conferred, granted, framed, revised, confirmed, acquired, incurred, appointed and done under the Act itself. (J. & K. Land Revenue Act No. XII of 1996). Thus the rules contained in Revenue Department standing order No. 23 A prepared under section 43 of the Jammu and Kashmir Land Revenue Act No. 1 of 1980 are deemed at present, for purposes of mutations Hidayat to be the rules made under the present L. R. Act No. XII of 1996. Rule 64 (b) of the Standing Order contains a direction to the Revenue Officers as to how mutations of Khana Nashin daughters is to be effected. The rule provides as under :

"*Khana Nashin Daughters* :— (i) In the valley of Kashmir the custom of having a *Khana Nashin* daughter is generally recognised. The custom of bringing in a *Khana Damad* for a *Khana Nashin* daughter is equally prevalent in the valley. In such cases the mutations shall be entered and attested in favour of *Khana Nashin* daughter. The estate cannot devolve on a *Khana Damad*. On the death of a *Khana Nashin* daughter, the name of her sons and daughters should be substituted. In the case of a *Khana-*

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Nashin daughter dying heirless, the estate can devolve on her husband till his death or remarriage. On the death or re-marriage of the *Khana Damad* the property will pass on to the heirs of the father of the *Khana Nashin* daughter It shall be the duty of a Revenue Officer attesting a mutation to carefully see that all necessary points involved in the decision of a mutation have duly been enquired into and properly decided and all necessary conditions and particulars have been entered to enable any dispute that may arise in future to be decided satisfactorily, before the mutation is finally sanctioned.

"*Inheritance by daughter* :— If a daughter succeeds to her father according to the personal law of the deceased, the mutation should be a mutation of inheritance and shall be so entered and attested."

It will again be observed that under rule 29 (ii) para (b) of the standing order the power to attest the mutation of Khana Nashin daughters in vested in Tehsildars. Again under section 68 of the Tenancy Act (No. 11 of 1980) an appointed heir cannot succeed to a right of occupancy without the consent of a land lord and an appointed heir has been deemed to include a son informally adopted in accordance with customary law and also a *Khana Damad*, but not illegitimate son. Thus as observed at the very outset, it will be noticed that the recognition of the custom of a Dukhtari Khana Nashin has found its place not merely in judicial decisions of various courts in the valley but also in standing order No. 23 and the Jammu and Kashmir Tenancy Act No. II of 1980.

The fact that every Khana Nashin daughter must have upon her the devolution of property in exactly the same manner as if she were a natural born son of the deceased causes every case that can be disputed to be brought into a court. There has been an immense growth of subtleties and refinements and fresh rules are imagined and invented. From very small beginings regarding this institution, a huge body of law has been developed which it is essential to study under the following heads :—

(1) Who can be a Khana Nashin Dukhtar ;
(2) Who can make a Khana Nashin Dukhtar ;
(3) The results of making a Khana Nashin Dukhtar ;
(4) The evidence and ceremonies relating to the making of a Khana Nashin Dukhtar ;

16. Daughters become heirs to their fathers when they are kept at home and husbands brought into the family for them.

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Illustration

'A', an agriculturist, dies leaving a daughter and a widow. The daughter shall succeed to the entire estate of her father if she is a Dukhtari Khana Nashin of her father *i. e.*, if a husband has been brought for her into her father's family.

Authorities:— Mala Bibi versus Taja Bibi, reported as 1937 P. L. R., J. & K. section page 149; Aziz versus Gani and others, reported as 1936, P. L. R., J. & K. section page 86; Rasool Sofi versus Mst. Asha Bibi, reported as 1936, P. L. R., J. & K. section page 104 and so on.

According to tribal custom in Kashmir if a widow with a daughter survives the deceased husband the whole of the property will devolve upon the daughter if she is kept at home with her husband *i. e.* if she is a Dukhtari Khana Nashin. Per Wazir, J. in Mst. Mala Bibi versus Taja Bibi :† "It has been argued by the counsel for the appellant that after the death of the father agricultural lands are mutated in the name of his widow for her life time and not in the name of Khana Nashin Dukhtar. No instance of this effect was given by the plaintiff in the trial court, while there are instances put forward by the defendant to show that the mutation is affected in favour of a Khana Nashin Dukhtar and not in favour of a widow. Question 149 of Tribal Custom by S. R. Dogra." In the case of Aziz versus Gani and others.‡ Dalal C. J. and Sawhney J. held that according to the customary law Mst. Fati as Khana Nashin daughter would be entitled to succeed to the property of Gaffar as an equal to a son but according to the same customary law she is not entitled to succeed to the property of her brother. Per Dalal C. J. and Qayoom J. in Rasool Sofi versus Mohommad Asha :¶ "The custom of a Khana Nashin son-in-law is a recognised custom in this State and the incidence attached thereto also shall be recognised..."

Rivaj-i-am:

Question 40—If a man dies leaving a widow or widows, a son or sons, a daughter or daughters, brothers or other relatives, upon whom will the inheritance devolve?

Answer—

ALL MUSSALMAN TRIBES AND SIKHS EXCEPT AS NOTED BELOW

If a man dies leaving a widow, a son, a daughter, brothers

† 1937 P. L. R., J. & K. section page 149 at 151.
‡ 1936 P. L. R., J. & K. section page 86.
¶ 1936 P. L. R., J. & K. section page 104.

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or relatives, the inheritance devolves upon the son or sons first. If the widow has a son, she does not inherit, because her own sons do inherit through her. If the widow be chiidless and she has sons of her husband by another wife she gets *mahar* only, and sometimes a plot of land for maintenance till remarriage. *Daughters become heirs when they are kept at home, and husbands are brought into the family for them.* In absence of sons or widows brothers do inherit.

Wains of Shopian, Kulgam Tehsil. The Shariat is followed regarding movable property, but not about inheritance of land.

Gujjars of Kund-Nandimarg. The second widow of the deceased shares equally with the sons.

Sunni Mussallman of Anantnag and Bijbehara Towns. The Shariat is followed in the matter.

Gujjars of Pattan. Daughters receive a share by gift only. Widows who have sons and want to live apart from their sons get their Sharai share.

Bomba Rajas. Daughters are not heirs. If an unmarried daughter remains at home, she is maintained.

Shias of all Tahsils. The Shariat is followed. But sisters or daughters married outside their village get heritage in cash and kind, but not landed property. They are arranged to acquiesce in such a settlement as a matter of course.

Other tribes of Pakali. Daughters are not given a share. If they live at home, they are maintained. If there be an uncle of a remote degree with the daughter, the heritage is divided according to the Shariat.

Rajputs of Deosar. Daughters do not inherit at all. In other matters they have the same custom as the Pandits.

All Pandits except as mentioned below. Sons are the first heirs followed by widows in absence of the sons of the deceased. Agnates inherit in absence of widows, and they are followed by Prohits and rarely by Sagotras.

Srinagar Pandits. Have a distinctive custom of inheritance regarding widows receiving only maintenance if the property be joint with their deceased husband's sons If the property be divided daughters inherit in default of sons.

If the property be joint, daughters get nothing but dowry and are married. The expenses and the after-expenses of marriage are met from the property of the deceased father. The rest of the property devolves upon his brothers.

Question 49— If a man die leaving a widow or widows, and either a daughter or daughters, or brothers or their descendants, or uncles or their descendants, or

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great-uncles or their descendants, but no male lineal descendants, upon whom will the inheritance devolve ?

Answer—

All Mussalman Tribes except as below. If a widow with a daughter survives the deceased husband, the whole of the property will devolve upon the daughter, *if she is kept at home with her husband (Dukhtar-i-khana Nashin with Khanadamad).* The widow can get only dower on its demand. If a widow survives with the brothers of the deceased or their descendants, the uncles or their descendants, or great uncles or their descendants, the widow inherits only life-interest in the estate till remarriage. After death of such a widow, the heritage goes to the deceased husband's agnates.

Anantnag, Sopore and Srinagar Mussalman Tribes. The Shariat is followed in the matter.

Shias of Pattan and Sripratapsinghpura Tehsil. Widows get one-eighth and Mahar out of the property of the deceased husband, and the daughters of the deceased husband get the remaining property with the widow.

In their absence brother or their descendants with other Sharai heirs do inherit, but as regards the landed property it is not inherited, as enjoined upon in the Shariat. The daughters at home, or the sons-in-law, living with their fathers-in-law inherit their landed property.

Gujjars and Bakkerwals of Nunar. Daughters inherit after agnates. The widow gets usu-fructuary rights till life or remarriage. She has no right of transfer of the property. Daughters inherit, if they are kept at home, but that is not customary among the Gujjars.

Sikhs of all Tehsils. The estate goes to the daughters of the deceased person. They hold it till marriage, when it is inherited by their mother till remarriage. In their absence, the property goes to the brothers, or to the nephews of the deceased.

All Pandits Except as Below. In the first instance, the property is inherited by the widow and after her come the brothers of the nephews of the deceased. Daughters can get only usual dowry on their marriage.

Pandits of Srinagar. If a man die without any male issue, holding a divided property, he is succeeded by his widow. If the deceased leave behind a daughter, she will inherit such property on the death of the widow. Such a daughter is succeeded by her descendants. If she has got two or three daughters, the heritage goes to the virgin girl. After the unmarried daughter the heritage goes to the married daughter, provided she be poor; if she be not poor, the barren daughter gets the heritage. On, the death of daughters their descendants inherit.

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In default of issues to the daughters, the property reverts to the agnates of the original proprietor.

Question 58.—In what circumstances are daughters entitled to inherit ?

Answer—

All Tribes Except as Noted Below:- Daughters inherit only when they reside with their husband in their father's home and are made Dukhtar-i-Khan-nishin, otherwise not.

Gujjars of Nandimarg, Sunnis of Khanabal, Shias of Badgam and Nunar, towns people of Baramulla and Sopore, and Srinagar Mussalmans. Follow the Shariat, but in case of landed property, the Shias say that a daughter residing at home gets usual share, but those given abroad are gratified to remit there share in the landed property.

Watals and Dunga Hanz of Anantnag Tehsil. Daughters inherit if there be any property.

Gujjars and Bakkarwals of Nunar. Daughters inherit, when there are no agnates. A daughter who lives with her father together with her husband, and does house-hold work in the life time of her father and brother, inherits the movable property equally with her brothers. Daughters do not inherit landed property even if they live in their father's home.

Other Tribes of Pakhli. A daughter is entitled to maintenance only as long as she lives with her father. She is entitled to inherit only when there are no male lineal descendants of the deceased. In default of these agnates, she inherits the property along with other agnates according to the Shariat, and gets full powers of disposition.

Pandits of all Tehsils except as noted below, Rajputs of Deosar, Rajas of Yaripura and Gujjars of Chharat and Kund. Daughters do not inherit, but they may get a share by gift.

Pandits of Srinagar. When a man dies, leaving no male issue, but only widows with daughters, daughters inherit the divided property of their father after his widow, but in case of undivided property they inherit till marriage.

17. The custom of the institution of Dukhtari Khana Nashin was judicially recognised to be prevalent among the Hindus and Sikhs of the valley as well. But according to a more recent decision of the High Court of Judicature (Madho Bat and another versus Lachman Bayu and others, decided by the High Court of Judicature on the 12th of Bahadoon 2002) the custom of the institution of a Dukhtari Khana Nashin has not been recognised to be prevalent among the Kashmiri Pandits (Gurins) of Srinagar.

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Authorities :—Jagan Nath minor versus Matkuji, decided by the High Court of Judicature on the 29th of June, 1936, corresponding to the 16th of Har, 1993 ; Prem Nath versus Ram Chand, decided by the Revenue Commissioner on the 8th of September, 1938 ; Mst Janki, Khana Nashin Daughter of Man Singh, of Tehsil Uttarmachipora versus Gokul Dai etc., decided by Hon'ble the Revenue Minister (P. C. Mogha) on the 29th of July 1939, corresponding to the 14th of Sawan 1996 ; Refer also Madho Bat and another versus Lachman Bayu and others decided by the High Court on the 12th of Bahadun 2002.

"A large number of witnesses, Amar Singh, Zanardan Lal Kaul and others depose to Mst. Daya Mali being Khana Nashin daughter. One Sadique Dar who lived in the village and whose father was a servant of Deva Kaul deposed that her husband came to live in Shankar Kaul's house as Khana Nashin son-in-law. It was argued that from the evidence it appeared that Mst. Daya Mali went to her husband's house and when she became widow, she was brought to Shankar Kaul's house and kept there and that this circumstance does not point to the woman being a Khana Nashin daughter. As already pointed out the details of an event nearly half a century old cannot be proved with any exactitude. Sadique Dar's evidence is in favour of Mst. Daya Mali's husband coming to live at the house of Shankar Kaul. We hold that *Mst. Daya Mali was a Khana Nashin daughter.*"†

In the case of Mado But and another versus Lachman Bayu and others (decided by the H. C. on the 12th of Bahadoon 2002) their Lordships of the High Court held as under : "……Both the lower courts have concurrently found that Wassa Bayu father of the defendants was adopted by Nidhan Bayu and that Mst. Daya Mali grand mother of the plaintiff was not a Dukhtari Khana Nashin of Nidhan Bayu nor was there any custom of making a Khana Nishin daughter. These findings are supported by evidence and are conclusive……".

Rivaj-i-am.

In answer to question number 149 Pandit Sant Ram Dogra writes that among all pandits in the first instance the property is inherited by the widow and after her come the brothers and the nephews of the deceased. Daughters can get only usual dowery on their marriage. So far as Pandits of Srinagar are concerned he points-out in the same question that if a man die without any male issue holding a divided property, he is succeeded by his widow. If the deceased leave behind a daughter she will inherit

† Jagan Nath versus Matkuji, decided by the High Court on the 16th of Har, 1993.

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such property on the death of the widow. Such a daughter is succeeded by her descendants and so on. The same custom in this behalf has been pointed out by him in answer to question 58. These questions have been completely incorporated in this book under article 17 at pages 106, 107 and 108. It seems that no reference regarding the non-existence of the custom referred to in this article is contained in the rivaj-i-am itself.

Remarks :—Although the custom of appointing a daughter as a Dukhtari Khana Nashin has been recognised among the Hindus of the valley in some cases yet the instances in which daughters have been appointed as Dukhtari Khana Nashin are very few. Hindu feelings are strongly against the institution of the *Khana Damad*, and a proverb runs :—

"Gari pett Zamatur, bara pett hoon".

"If a son-in-law lives with his father-in-law, he is like a dog at the outer door."

The Hindu settlers from the Punjab also strongly resent against this institution. A proverb in Punjabi runs as follows :—

"Sohre ke ghar jawai Kutta
Bahin ke ghar bhai Kutta."

"If a son-in-law visits father-in-law too often he is a dog like brother, who visits his sister."†

18. The existence of a son, natural or adopted, does not effect the right of a person belonging to the Muslim agriculturist class to make his daughter a Khana Nashin daughter. Nor is the right of the father confined to the making of only one daughter as a Khana Nashin daughter.

Illustration

A, a Muslim agriculturist, has two sons and two daughters. A marries both his daughters at home. A's estate will devolve upon his two sons and two daughters in equal shares.

Authorities :— Rasool, Gani and Razak versus Ahmad Rathar and others, civil 2nd appeal of 1991, decided on the 14th of Asuj 1991 ; Mst. Farzi and Mst. Shah Mali versus Mohi-ud-Din

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† Rose's Punjab Customary Law, part II page 198.

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and others, 1st appeal number 61 of 1992, decided on the 30th of Katik, 1992.

Remarks :— Unlike adoption where the adopting father cannot make an adoption in the presence of an already existing son, natural or adopted, the existence of a son does not effect the right of a father belonging to a Muslim agriculturist class to make his daughter a Khana Nashin daughter. Even in the existence of a number of sons at the time of making his daughter a Khana Nashin Dukhtar, a father has unrestricted power to make his daughter a dukhtari khana nashin. In the case of Rasool, Gani and Razak versus Ahmad Rathar and others, civil 2nd appeal No. 152 of 1991, decided on the 14th of Asuj, 1991, Musmati Jani succeeded as a Khana Nashin daughter to one third of the property of her father even in the presence of her two brothers Wahab and Hura.

The right of a father is not confined to the making of only one daughter as a Khana Nashin daughter. He can make, if he so chooses, several daughters as his Dukhtari Khana Nashin. "Daughters inherit only when they reside with their husbands in their father's home and are made Dukhtari Khana Nashin, otherwise not". Pandit Sant Ram Dogra's Customary Law page 52, question 58. The plurality of the word 'daughters' shows that several daughters can be made as Khana Nashin by their father. In the case of Mst. Farzi and Mst. Shah Mali versus Mohi-ud-din and others, Civil 1st appeal number 61 of 1992, before Dalal C. J. and Sawheny J., decided on the 30th of Katik, 1992 the only question for decision was whether Mst. Zebi and Khatji were Khana Nashin daughters of Rahim and not merely whether only one of them *viz.* Mst. Zebi or Mst. Khatji was so.

19. A Khana Damad must be a person whom the Dukhtari Khana Nashin can be legally given in marriage.

Remarks :— A daughter is said to be a dukhtari khana Nashin if she is kept at home by the father and a husband is brought into the family for her. The husband brought for her is called Khana Damad. A Khana Damad must be a person whom the Dukhtari Khana Nashin could be legally given in marriage. As such a maternal uncle or a paternal uncle cannot be brought as Khana Damads into the family for a daughter.

20. Under some older decisions the right to make a daughter a Khana Nashin daughter was recognised to vest exclusively with the father.

But according to some other decisions, one of which was from the highest authority in the State, the custom of make-

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ing a Khana Nashin daughter by the father exclusively was not recognised to exist for minor daughters who would never become Khana Nashin daughters.

According to a more recent decision from the High Court of Judicature the old view has been upheld and the right to make a daughter a Khana Nashin daughter has been recognised to vest exclusively with the father.

Explanation 1 :— A mother has no right to make her daughter a Dukhtari Khana Nashin in the life time of her husband.

Explanation 2 :— If a daughter is mad a Khana Nashin daughter by her father and a Khana Damad is brought into the family for her by her father who dies immediately after the death of the father of the Khana Nashin daughter, the mother has no right to marry her daughter as her Dukhtari Khana Nashin after the death of her husband.

Illustration.

A, the daughter of her deceased father belonging to the muslim agriculturist class, has been made a Khana Nashin daughter by her mother ; *i. e.* a husband has been brought by the mother into her husband's home for her daughter. A was a minor when she lost her father. According to the decision of H. H. in the case of Mst. Khatji versus Nabir and others, A is entitled to succeed to the estate of her deceased father even though she has not been made a Dukhtari Khana Nashin by her father during his life time. But according to the recent rulings of the High Court A cannot succeed to the estate of her deceased father because she could be made a Khana Nashin daughter by no one except her father.

Authorities :— Mst. Zeba versus Mohomad and others decided by the High Court of Judicature (D. B) on the 12th Asuj 2000 ; Mst Khatuni versus Aziz and two others decided by the High Court (D. B) on the 24th of Sawan 2001 ; Sona Khan and others versus Rajab Parey decided by the High Court on the 9th of Asuj 2002 ; Aziz Dar versus Mst. Farzi decided by the High Court of Judicature on the 5th of Katak 2000 ; 9 J. & K. Law Reports page 195.

The words 'Dukhtari Khana Nashin' clearly imply that it is either a father or a mother who can make their daughter or daughters as Khana Nashin. A brother cannot, as such, make his sister as Khana Nashin for his own property. She would then no longer remain a Dukhtari Khana Nashin but would be a 'Hamshera Khana Nashin'. Nor can a paternal uncle make his

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brother's daughter a Dukhtari Khana Nashin for his brother to succeed to his property.

Remarks :— There does not seem to be any direct authority in the Tribal Custom of Pandit Sant Ram Dogra as to the making of a Khana Nashin daughter by a father or a mother. "An unmarried daughter inherits her father's property till her marriage and on her marriage the property goes to the agnates of the father."* This may imply that unless the father makes his daughter as Khana Nashin at the time of her marriage, she cannot inherit his property after her marriage. "Daughters become heirs when they are kept at home and husbands are brought into the family for them."† So that a person capable to give a girl in marriage to another has got also a right to bring a husband for such a girl to reside at her father's house, and possibly that the right may not exclusively rest with a father to make his daughter a Duktari Khana Nashin. If that were so the words used in the Rivaj-i-am would have been: "Daughters become heirs when they are kept at home and husbands are brought into the family for them *by their father.*"

Previous decisions commented :

It has been held in a number of cases decided by the highest authority in the State that it is only a father who has got the right to make a daughter a Dukhtari Khana Nashin and therefore, as a result of these decisions, if a father dies leaving a widow and an only unmarried daughter the widow has no right to make her daughter a Dukhtari Khana Nashin. In the case of Mst. Fazli versus Rasool and others.‡ V. N. Mehta, esq. the then R. M. held: "..... There is no question of the girl being declared a Khana Nashin Dukhtar because her father was dead before she was married and there is no question of the girl being made a Khana Nashin Dukhtar by anyone else. There is no law to that effect nor the direction of the father."

According to this decision, therefore, if there is a specific direction existing on behalf of the father, a daughter can be made a Khana Nashin Dukhtar by anyone else having a right to give her in marriage after her father's death. In a prior decision, contrary to this, it has been clearly held that the right exists exclusively with the father and none else to make a daughter a Khana Nashin daughter and that the question of the intention of the father by producing oral and written documents subsequent to the father's death in favour of the daughter as Khana Nashin daughter does not all at arise. In that case V. N. Mehta, the then R. M., observed: "..... There was some idea of bringing

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* Vide page 9 of Sant Ram Dogra's Customary Law.
† Sant Ram Dogra's Customary Law page 40, question 40.
‡ Revenue appeal number 86 of Samvat 1992.

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in a Khana Damad and marrying him to Mukhti. But the idea never materialized in the life time of the father Mahada. No doubt Mohd and Ahmad did admit that Mst. Mukthi was intended to be their Khana Nashin sister but this kind of admission cannot derogate from their legal right which according to custom completely shuts out a woman who is not married by the father claiming as Khana Nashin Dukhtar. This is the legal position and we would like all courts to keep in this view otherwise there is every danger of oral and written documents subsequent to the father's death in favour of a daughter as Khana Nashin daughter being put in ....."†

"In this case it is clear from the record that Mst. Zena Bibi was five years old when her father died. I have constantly held that a daughter cannot be created as Khana Nashin daughter by anyone else except her father. This is the custom, there is no will to the effect that the father wanted to make her a Khana Nashin Dukhtar when she reached marriageable age. In these circumstances I have no reason to disbelieve the evidence produced by the other side that the girl was not married as Khana Nashin daughter," observed Mr. V. N. Mehta, the then R. M., in the case of Ramzan Gani versus Mst. Zena Bibi.‡ Thus according to this decision a will can be entertained to consider the intention of the father in favour of his daughter as Dukhtari Khana Nashin. In the case of Mst. Jani versus Mst. Mukhti and Mst. Mali.¶ Mr. Mehta held :— "As a matter of fact it is clearly shown that her father was dead at the time and the mother has no right to declare anybody as Khana Nashin daughter."

Khatji versus Nabir.

As a result of these cases, *per se*, the right of making a Khana Nashin daughter exclusively rested with the father and the mother had no right to make her daughter a Dukhtari Khana Nashin even though the father would die when his daughter would be so young in years that the question of marriage could not arise. As to the intention of the father, there did not exist any uniformity in the decisions whether such intention could or could not be taken into consideration. Nor could there be any question of minor daughters becoming Khana Nashin simply because their father could not see them married at his house in his life time. These decisions were followed by the decision in the case of Mst. Khatji of Badren versus Nabir and others†† and it has been held in this case that the custom of making a Khana Nashin daughter by the father exclusively even if it exists,

† Mohommad and others versus Mst. Mukhti appeal number 6 of 1991 decided on the 24 of Asuj, 1991.
‡ Decided on the 10th of October, 1934. ¶ Decided on the 24th of June, 1938.
†† His Highness' order dated the 15th of April, 1937.

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cannot be accepted for minor daughters who are entitled to consideration and would never become Khana Nashin daughters. The judgment of that case is given below in extenso :—

His Highness' decision :

"The dispute relates to the occupancy holding of one Ramzan. On his death mutation was made in favour of his minor daughters, Mst. Khatji and Mst. Zebi, of whom the latter is dead. The former being minor at that time was shown under a particular guardianship. She married at her father's house and continued to live there. Six years after the mutation was made in her favour, the collaterals of Ramzana submitted an application stating that Khatji had married out of the family and had left her home and therefore, her mame ought to be removed from the record and the names of the collaterals entered.

"The Governor of Kashmir and the Revenue Minister held that a daughter could be a Khana Nashin daughter only if her father makes her a Khana Nashin daughter. The Revenue Minister agreeing with the Governor ordered that the occupancy holding of Ramzan be mutated in the name of the collaterals. Khatji has now come up in revision of this order of the Revenue Minister.

"The allegation of the respondents that Khatji had left her home is quite wrong. She lives in the village and has married one Gaffar to whom her father Ramzana had intended to marry her. As regards the view held by the Governor and the Revenue Minister there is no proof that such a custom exists and even if it exists, it cannot be accepted for minor daughters who are entitled to consideration and would never become Khana Nashin daughters. In this case, however, there is no evidence of the desire of Ramzana to make Mst. Khatji a Khana Nashin daughter by keeping her in the house and marrying her to Gaffar who was to remain in the house of Ramzan.

"Therefore, as advised by the Judicial Minister and the Revenue Minister, the order of the Governor of Kashmir and the Revenue Minister being wrong is hereby discharged and the order of the Wazir Wazarat restored..."

Gist of the case :

According to this decision, therefore, even a mother has got a right to make her minor daughter as Khana Nashin provided the father does not exist at the time of marrriage, but it does not confer upon the mother a right to make a daughter a Dukhtari Khana Nashin in the life time of her husband.

Even after the decision in the case of Mst. Khatji versus Nabir and others it has been held by Mr. P. C. Moga, Revenue

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Minister, in the case of Mst Mukhti versus Aziz† that as the father of Mst. Mukhti was dead she could not be admitted by anyone else as Khana Nashin daughter. It was remarked that under the Customary Law an unmarried daughter inherits her father's property till her marriage and on her marriage the property goes to the agnates of the father.‡ In this case reliance has been put upon the Customary Law of Sant Ram Dogra and the decided cases on the subject. These decisions have also been followed in a number of cases subsequently by the High Court and in these decisions it has been held that *the right to make a daughter a Khana Nashin, daughter exclusively rests with the father and the mother has no right to make her daughter a Khana Nishin daughter after the death of the father of the danghter viz her husband.* In the case of Mst. Zebi versus Mohd. and others (decided by the High Court on the 12th of Assuj 2000) it has been held :—

Zebi versus Mohd.

"—Mst Zebi's suit as Khana-Nashin daughter cannot be upheld because it is based upon a very incorrect notion of the requirements in that behalf. It will be noticed that for treatment of the subject in Sant Ram Dogra's book entitled the code of tribal customs in Kashmir impression that is gained is that a daughter is made Khana Nishin only by her father *i. e.* when she is married in the life time of her father and her husband *i. e.* the Khana-Damad resides in the father's house as such. In cases, therefore, where a daughter was not even married in the lifetime of the father, no question of her being a Khana Nashin daughter arises. The lower court has proceeded on the assumption imported perhaps by a half notion of adoption in the Hindu Law that a *widow* can have authority to make her daughter a Khana Nashin after the death of her husband. There is no warrant for this assumption. The lower court has it— "Under the custom prevalent among Zamindars, a widow is empowered to appoint a Khana Nashin daughter. In this case that appointment of Zeba Bibi respondent I as Khananishin daughter was validated further by its having been made under the decision of her husband by Mst. Mali although there is no direct evidence about the intention or direction of Khazar wani deceased about the appointment of Mst. Zeba Bibi as dukhtar Khananishin ; but the same is proved by his conduct of accommodating Khazar Wani in his own house as his prospective Khana-Damad." There is no warrant for any of the propositions laid down here. It is true that there is on record the evidence of Lumberdar Haffiz Ullah who says that

† Decided on the 19th of Har, 1996.
‡ Vide page 9 of Pandit Sant Ram Dogra's Code of Tribal Custom in the valley.

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widow can appoint a Khana-nishin daughter. But this cannot take the place of a proved custom and it is wholly against the customs discovered by Sant Ram Dogra. In these circumstances I must set aside the unanimous finding of two courts below upon the question of Mst. Zebi being a Khana Nashin daughter because I regard this finding as not only incorrect but perverse."

In the case of Mst. Khatooni versus Aziza (decided by the High Court on the 24th of Sawan 2001), it was observed by their Lordships of the High Court :—

"...On a remand a specific issue with regard to custom was framed and on the trial of that issue Mst. Khatooni, the defendant, remained unable to prove that she was the Khana Nishin daughter of her father Rahim and in these circumstances the plaintiffs, who have been able to prove that they were the agnates of Rahim, were found to be entitled to inherit the property.

"Mst. Khatooni's own witnesses deposed that she was made Khana Nashin by her mother and it appears that she was married after the death of her father although arrangement with regard to the marriage was made during his lifetime. *There is a custom prevailing in the valley with regard to the making of Khananishin daughters but that custom is to the effect that Khananishin daughter is made not by the mother but by the father during his lifetime.* In these circumstances the evidence of the defendant herself goes to disprove the claim advanced by her."

In the case of Sona Khan and others versus Rajab Parey civil 2nd appeal No 9 of 2002 decided by the High Court of Judicature on the 9th of Asuj 2002, their lordships of the High Court went a step further and held that even if a daughter is married as a Dukhtari Khana Nishin by her father and a Khana Damad is brought into the family for her and after the death of the father of the daughter the Khanadamad dies, the mother shall have no right to marry her daughter as a Dukhtari Khana Nashin for the second time to another person. In the case of Aziz Dar versus Mst. Farzi (civil 2nd appeal decided by the High Court of Judicature on the 5th of Katik 2000) their Lordships of the High Court held :— "As Mst. Farzani was married long after the death of her father she could not be made a Khana Nashin daughter *for it is the father alone who can make his daughter as Khana Nashin at the time of her marriage and no one else can do so.—"*

The controverted question namely whether the mother of a muslim agriculturist girl living in the valley has a right to confer upon her daughter the status of a Dukhtari Khana Nashin

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after the death of her husband in pursuance of a direction of her deceased husband, has been considered at a great length in a reference by a Full Bench of the Kashmir High Court in the case Saja versus Ahad Sheikh and others (9 J. & K. Law Reports page 195) in light of all the previous decisions on the question with a special reference to His Highness' decision in the case of Khatji versus Nabir and it has been held that the decision in that case namely Khatji versus Nabir was given by His Highness' as the highest revenue officer and therefore would not be binding on subordinate civil courts and that it was the father and father alone who could make his daughter a Dukhtari Khananishin. The judgement of the case was delivered by Hon'ble Shahmeri J. who in his judgement observed :—

Saja versus Ahad Sheikh :

"...Now let me examine this decision, of which so much has been made in Nila Kanth Ganjoo's Digest of Customary Law of Kashmir on the merits. It appears that the Dispute in that case related to an occupancy holding of one Ramzan. On his death mutation was made in favour of his minor daughters, Mst. Khatji and Mst. Zebi. Mst. Zebi died and Mst. Khatji was married at her father's house and continued to live there. Six years after the mutation the agnates of Ramzan applied that Khatji had married out of the family and, therefore, the land be mutated in their favour. The Governor of Kashmir and the Revenue Minister held that a daughter could be made a Khana Nishin Dukhtar only if her father gave her that status. Khatji then went up in revision to His Highness'. In His Highness' order passed on the advice of the then Judicial and Revenue Minister it was held that there was no proof that a custom existed by which father alone can make her daughter a Khana Nashin Dukhtar and even if it existed it could not be accepted for minor daughters who are entitled to consideration and would never become Khana Nishin daughters otherwise. These details would clearly show that the order referred to above does not actually contain an instance of the family custom already existing. It, on the other hand attempts to legislate, in fact, it declares what in the interests of minor daughters the custom ought to be and it lays down that daughter can be made a Khana Nishin Dukhtar even after the death of her father. Such an order even if passed by the highest Court of law would be a nullity. It is obvious that the order was passed by His Highness in revision in the capacity of the highest Revenue Officer and not as a court. Presumably the mother was alive in this case, because the author of the Customary Law referred to above has in his note on the case stated that according to this decision mother has got a right to make her minor daughter as Khana Nishin Dukhtar provided the father was not alive at the time of the marriage. Needless to say that this decision by which a new custom or at least an extension of a custom superseding the personal law not established by any evidence has been given

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effect to is against the provision of law contained in section 4 of the Sri Pratap Jammu and Kashmir Laws Consolidation Act, 1977 and the decisions of the Board referred to above. To Mohommadan Law the institution of Khana Nashin Dukhtar is absolutely foreign. Khana Nashin Dukhtar inherits as a son and where there is a son shares equally with him while under Mohommadan Law, a daughter's share is only one half of a son. It is only where custom in a family is established that a father can, make his daughter a Khana Nashin Dukhtar if both she and her husband who has been brought into the family resides with him. Any extension of this custom by which a mother too can make her daughter a Khana Nashin Dukhtar after her father's death would be a further encroachment on the pure Mohommadan Law by which succession and inheritance are to be governed and such a custom cannot be held to exist unless the requiste proof to establish it is forthcoming. This decision has, therefore, been wrongly invoked by the lower courts for the purpose of deciding this case.

"While the mutation case referred to above cannot help in the decision of this case even as an instance of custom set up there are a number of rulings of this court by which it has been held that a father alone can make a *Khana Nashin Dukhtar*. In an unreported Division Bench Case Aziz Dar versus Mst. Farzani Civil 2nd appeal No 108 of 2000 decided on 5th Katik 2000 to which the Hon'ble Chief Justice was a party it has been clearly laid down... "...It is father alone who can make his daughter Khana Nashin at the time of remarriage and no one else can do so..." In another case Mst. Zebi versus Resha Mir and others (1) J. & K. Law Reports 254 to which reference has been made by the lower appellate court it was held that the daughter can be made Khana Nashin only when she with her husband resides with her father in his home. This case went up in further appeal to His Highness' from where it was remanded for the determination of certain points set forth in the judgement of the Hon'ble Board of Judicial Advisers. But the view of the High Court that a daughter can be made Khana Nashin only when she and her husband live with her father in his home has been upheld by the Board. My brother Kilam J. in his referring order has expressed his doubts as to the correctness of the reasoning given by the Division Bench of this court in support of the proposition that a daughter cannot be made a Khana Nishin Dukhtar by her mother. (Mst. Zebi versus Resha Mir and others (1) J. & K. Law Reports 254) referred to above. It has been stated there :- "The mother as has been rightly observed by the lower court has only a limited interest and, therefore, she cannot have any rights higher than those of her own on any person." For the purpose of answering the question referred to us, I don't think it necessary to express any opinion on this observation made by

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Ganga Nath C. J... It appears to me, however, that we are not concerned with the reason given by the lower court in that case in arriving at the finding that the father alone can clothe his daughter with the status of a Khana Nashin Dukhtar and seemingly approved by the learned C. J. What is material for the purpose of the decision of this reference is that this court in two Division Bench cases referred to above has clearly committed itself to the view that it is the father and father alone who can make his daughter a Khana Nashin Dukhtar and the finding of this court in this respect in Mst. Zebi versus Resha Mir (1) J. & K. Law Reports 254 has been upheld by the Board. Where in Kashmir certain Muslim tribes follow this particular custom of making their daughters Khana Nashin Dukhtar the, Mohommadan Law will be superseded only to the extent that this custom is fully established and an extension of this custom namely, that even a mother can make her daughter Khana Nashin if she is required to do so by a direction of her deceased husband has neither any evidence of the requisite standard nor an authoritative decision to support it. The High Court and the Board decisions referred to above and Sant Ram Dogra's Code of Tribal Custom in Kashmir quoted with approval in custom cases go clearly against it. In the code answer to question No 58 viz. in what circumstances are daughters entitled to inherit is as follows :—

"Daughters inherit only when they reside with their husband in their fathers home, and are made Dukhtari Khana Nashin otherwise not....."

Results of making a Khana Nashin daughter :

21. When a daughter is kept at home and a husband has been brought into the family for her she is treated as a son of her father or an equal with other sons of her father if there be any.

Explanation :— When a daughter is excluded from inheritance of her father's estate under custom she cannot be allowed to take the possession of same estate after it has descended to her brother in her capacity as a sister.

Exception :— In the existence of a son, natural or adopted, a Kashmiri Pandit cannot make his daughter a Dukhtari Khana Nashin.

Illustration.

A, a Muslim agriculturist dies leaving two sons and a daughter. The daughter has been kept at home and a husband brought into the family for her. The estate of A will devolve upon the two sons and the daughter in equal shares.

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Authorities :— Aziz versus Gani and others, reported as 1936, P. L. R., J. & K. section page 86 ; 1I J. & K. Law Reports page 79.

Case law referred:

The effect of making a Khana Nashin daughter is the conference upon her the status of a son or if there is a son or sons existing an equal status with that son or sons for the purpose of inheritance of her father's property. When a daughter continues to live at her father's house even after her marriage and a husband is brought into the family for her, she is treated as a son of her father or an equal to other sons of the father if there be any. Per Dalal C. J. and Sawhney J. in the case of Aziz versus Gani and others† ".....According to customary law Mst. Fati as Khana Nashin daughter would be entitled to succeed to the property of Gaffar as an equal to a son ....." She is treated as a male lineal descedant of her father and can claim a partition of her father's property in exactly the same manner as any other son or sons if the property were undivided. Per justice Sham Kishan Dar in Mst. Zooni versus Salam and others.‡ "A well recognised custom prevails in the valley by which daughters are excluded from the inheritance of their father's estate unless they are made Khana Nashin. And it seems highly anamolous that the daughters after being excluded from succession to their father's estate should be allowed to take the possession of the same estate after it has descended to their brother in their capcity as sister."

Remarks :— The Hindu Law does not recognise a daughter as an heir to the estate of her father in the existence of a son, son's son, or son's grandson. Therefore, on this recognised principle, a Kashmiri Pandit living in the valley does not make his daughter a Dukhtari Khana Nashin in the existence of his son to confer upon her an equal status with that of his son or sons.

22. A Khana Nashin daughter is not treated for the purposes of inheritance as a brother of her brothers or a sister of her sisters. The changed status of the Khana Nashin daughter is only in regard to the estate she is to inherit from her father.

A Khana Nashin daughter cannot also inherit the property of her sister who was also a Khana Nashin daughter of her father but has died sonless ¶

Illustrations.

(1) A dies leaving two sons and a daughter. The daughter

† 1936 P. L. R., J. & K. section page 86.
‡ 11 J. & K. Law Reports 79.
¶ 6 J. & K. Law Reports page 1 at page 3.

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is a Khana Nashin daughter. The whole estate of A devolves upon the two brothers and the sister in equal shares. Subsequently one of the brothers dies unmarried. The sister claims half of her brother's share. The claim cannot be substained. She cannot succeed to her deceased brother as a brother.

(2) A dies leaving two daughters. One of the two daughters is unmarried and the other is married at home *i. e.* she is a Khana Nashin daughter of her father. At the death of A, his land is mutated in the name of his two daughters. Subsequently the unmarried one is married out of home. The married sister claims the property of her younger sister for being the Khana Nashin daughter of her father. Her claim cannot be sustained in preference to the claims of her deceased father's collaterals.

Authorities :— Mst. Jani versus Lassa Sheikh, revenue appeal number 43 of 1993, decided on the *1st of sawan, 1995 ;* Jabbar, Gaffar and Sultan versus Ahmad Lon, His Highness' decision dated the 31st of October, 1932 ; Mst. Ramzana Begum versus Fateh Khan and others decided on the 24th of Har, 1996 ; Aziz versus Gani and other, reported as 1936 P. L. R., J. & K. section page 86. Ali Rather versus Habib, 6 J. & K. Law Reports page 1. Aziz minor versus Rahim and others decided by the High Court (D. B.) on the 14th of Jeth 1999 ; 38 P. L. R., J. & K. section 86.

Case law discussed in detail :

The fact that a Dhukhtari Khana Nashin is to be considered as a male lineal descendant of her father does not mean that she is to be treated for the purposes of inheritance as a brother of her other brothers or a sister of her sisters. The changed status of the daughter is only in regard to the property she is to inherit from her father. She cannot, therefore, claim to succeed to her brother's property like a brother or her sister's property like a sister. In Aziz versus Gani and others,† Mst. Fati was treated as a son to succeed to Gaffar's property but could not be treated as a male to succeed to her brother's property like a brother. Similarly in the case of Mst. Jani versus Lassi Sheikh‡ a dispute arose as to whose name should be recorded on the marriage of a daughter out of the family. The married daughter's sister claimed the entry in her favour as a Khana Nashin Dukhtar of her father. But it was held by Sir L. G. Mukerjee that she could not succeed to the property of her sister in preference to the collaterals of her father. Mr. Mukerjee in that case remarked : ".....Jani at the most is only a Khana Nashin Dukhtar of her father. But she cannot inherit

† 1936, 38 P. L. R., J. & K. section page 86.
‡ Revenue Appeal No. 43 of 1993, decided on the 1st of Sawan, 1995.

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from her sister Mukhti whose share lapses on her being married out of the family. Lassi is the collateral and his name has been properly ordered to be put down by the Governor." Similarly it has been held by the highest authority in the State† in the case of Jabbar, Gaffar versus Ahamad Lon that according to custom observed among Mohommadans a Khana Nashin daughter does not have a share of her brother who is dead. The judgment of His Highness is given below :—

His Highness' decision on the point

"The facts of the case are that when the father Satar died one third share was given to the Khana Nashin daughter. Now the dispute is as regards mutation of the name with respect to one third share of Mohommad. At first his widow Mst. Jamali was in possession but she has lost her right to possesion on her remarriage. According to custom observed among Mohommadans here a Khana Nashin daughter does have a share but she does not have a share of her brother who is dead. The share of Mohommad must naturally revert to Ramzan's sons....."

In the case of Aziz versus Rahim and others, decided by the High Court (D. B.) on the 14th of Jeth 1999, the High Court held that under the Customary Law a Khana Nashin daughter inherits the property of her father in the same degree as her brothers but because of that status no claim can be laid, even by a Khana Nashin daughter, to the property belonging to her brother."

Per S. K. Ghose C. J., in Ali Rather versus Habib‡ :— ".....There is no question now that the two daughters were Khana Nasbin daughters and that the parties are governed by custom in the matters of succession. The learned advocate for the appellant has referred to passages in Sant Ram Dogra's Code of Tribal Customs. No better authority is cited and I may take it that the statement of customary law in the passages quoted must be accepted as correct. The passages are question 40 at page 38, Question 62 at page 52, Question 64 at page 54 and Question 69 at page 56. The passages of pages 52 and 56 may be set forth here.

Question :— What is the nature of the interest taken by a daughter in the property she inherits ? Define her rights of alienation, if any, by sale, gift, mortgage, or bequest.

Answer :—

ALL MUSSALMAN TRIBES AND SIKHS EXCEPT AS MENTIOND BELOW.

The nature of the interest of a daughter who resides at

† Decision of His Highness the Maharaja Bahadur dated the 31st of Oct. 1932. ‡ 6 J. & K. Law Reports page 1.

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her father's home with her husband is life interest only in the property inherited by her. This property goes to her sons, if there be any; if she be sonless, the inheritance lapses to the agnates of her father. The husband does never get a share unless the men concerned in the case would assign to him a share by deed. A daughter is in no way, entitled to alienate her property to any one but to her own children. She can alienate her moveable property by sale, gift mortgage or bequest.

Question 56 :— Does the property ever devolve upon sister or upon sister's sons, how are their shares computed ?

Answer :—

ALL TRIBES EXCEPT AS NOTED BELOW.

Daughters if kept at home, together with their husbands share equally with their brothers. Daughters' sons inherit their mothers share."

For want of better authority this is a complete statement of the customary law which is relevant in this case. The contention is that since in the event of a Khana Nishin daughter dying sonless "the inheritance lapes to the agnates of her father it must be taken that the word "agnates" would include a Khana Nishin sister. Since Khana Nishin daughters inherit like sons, they are not sons and therefore the word "agnates" cannot include such Khana Nashin daughters. Moreover the answer to question 62 taken as a whole would be inconsistant with the meaning sought to be put to it by the learned Advocate for the appellant. The plain meaning of the answer to question 62 is that according to the custom as set forth therein if the Khana Nishin daughter dies sonless the inheritance lapses to the agnates of her father and does not go to another Khana Nishin daughter. This view is consistant with that taken in two previous cases by this High Court, namely, 36 P. L. R., J. & K. 38 and 38 P. L. R., J. & K. page 66....."

The question of a Khana Nashin daughters' right to succeed to her brother's property has also been considered at length in the light of all previously decided cases and the Rivaj-i-am in the case of Mst. Ramzana Begum versus Fateh Khan and others.† Mr. Mogha, the then Revenue Minister, in this case held as follows :—

"The property which is now in dispute belonged to Fateh Khan, brother of the appellant and not to her father. Under

† Decided on the 24th of Har, 1996.

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the ordinary Mohommadan Law a sister gets a share in the property of her brother but it is stated that it is not the custom here. Dogra's Tribal Custom is not very explicit for although the question asked in question 69 is very clear, namely does the property devolve upon the sisters, yet the answer relates to all tribes except those noted thereafter is not clear. It speaks of daughters. But it is further stated in the answer that the *Shia* and other tribes follow the *Shariat* in the matter. This shows that others don't and that, therefore, according to the Customary Law amongst the other sects of the Muslims sisters don't inherit. This inference is corroborated by an order of His Highness' in the case of Jabbar, Gaffar, Sultan versus Ahmad Lon, decided on the 31st of Oct 1932. The judgement of the case has been shown to me by the respondent's counsel. That case was exactly similar to the present case. In that case also the names of Khana Nashin daughters were entered in the papers on the death of the father and on the death of the son the name of the daughter was not entered on the ground that under the custom observed amongst the Mohommadans a sister does not inherit her brother....."

23. When daughters inherit as Dukhtari Khana Nashin they succeed to all kinds of property of their deceased father whether it be moveable, immoveable, ancestral or self acquired.

Illustration.

'A' a deceased muslim agriculturist is succeeded by his son 'B' and a daughter '(D)' as his Dukhtari Khana Nashin. A's assets consist of agricultural lands, residential building, livestock and moveable property. A's assets will be equally shared by 'B' his son and 'D' his daughter inrespective of the kind of property.

Remark :— It has been noted that when a daughter succeeds as a Dukhtari Khana Nashin with a brother or brothers to her deceased father's property, she usually surrenders a portion of her share in moveable property or livestock of her deceased father. But that does not mean that under custom she cannot succeed to this kind of property with her brothers to a full share to which she would be entitled if she had not surrendered any portion of her share in the property.

Rivaj-i-am referred:

Question 59.—Is there any distinction as regards the right of daughters to inherit immoveable or moveable, ancestral or acquired property of their father ?

Answer :—

ALL MUSSALMAN TRIBES AND SIKHS EXCEPT AS NOTED BELOW

No distinction regarding kind of property is made when

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daughters inherit which they generally do when they reside with their father. But daughters married outside, and not kept at home, receive a share of the moveable property according to the Shariat among the Pattan Zamindars.

Towns people of Sopore and Wains of Shopyan. The Shariat is followed in the matter.

Rajputs of Deosar, Bomba Rajas, Gujjars of Pattan, Watals of Handwara, and Gujjars and Bakkerwals of Nunar. Daughters do not inherit moveable or immoveable property.

Shias of Pattan. The custom of a daughter inheriting the landed property does not obtain.

Other Pakhli Tribes of Nunar. When daughters become heirs in their minority in default of agnates, they share every kind of property.

All Pandits Except as Below, and Gujjars of Nandimarg. Daughters do not inherit but by gift and in that case no distinction of the kinds of property is made.

Srinagar Pandits. Daughters can never inherit their ancestral property, if the estate is joint.

24. A Khana Nashin Dukhtar succeeds to her father's property during her life time and transmits the property on her death to the children of the Khana Damad.

But a Khana Nashin daughter's son cannot succeed to their mother's brother through their mother.

Nor does the daughter of a Khana Nashin daughter possess any right to claim inheritance to the property of her maternal grand father.

Illustrations.

1. A dies leaving one son B and one daughter C. The daughter is a Khana Nashin daughter. She has one son D. B dies leaving no issue. D claims succession to B's property through his mother C. D's claim cannot be sustained in preference to the claims of A's collaterals.

(2) A has a Khana Nashin daughter and a son. The Khana Nashin daughter predeceases her father and the property of A is inherited by his son. Subsequently the son also dies without any issue. The daughter of A's predeceased Dukhtar Khana Nashin cannot claim inheritance to A's property.

Authorities :— Rasool, Gani and Razak versus Ahmad Rathar, reported as 37 P. L. R., J. & K. section page 38, decided

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on the 9th of Asuj, 1919 ; Rahman versus Ahmad and Mohommad, decided by A. R. C. on the 13th of Maghar 1998 ; V. N. Mehta, R. M., in the revenue appeal number 10 of 1992 ; and Prem Nath versus Ram Chand, decided by the Revenue Commissioner on the 8th of September 1938. Ameer Mir versus Mst. Azizi (1) J. & K. Law Rsports 384.

Extracts from the Rivaj-i-am.

After daughters their sons and daughters succeed to their property. The shares are proportioned to the number of daughters, who inherited the property originally. Only those daughters inherit from whom a son-in-law is brought home.† Sons of daughters kept at home with their husband share equally with their brothers. Daughter's sons inherit their mother's share.‡ Per V. N. Mehta R. M. in Revenue Appeal No. 107 of 1992... "The Khana Nashin Dukhtar succeeds to her father's property during her life time and transmits the property on her death to the children of the Khana Damad. The son is a protective owner of the whole property during the time of the life estate of his mother."

Authorities referred

The sons of daughters have no right to inherit through their mother any of the property of their mother's brother. The law relating to the succession of a Khana Nashin daughter's son has been throughly discusseed by Dalal C. J. in the case of Rasool, Gani, and Razaq versus Ahmad Rather, 37 P. L. R., J. & K. section page 38. An extract from the judgment is given below:—

Right of Khana Nashin daughter's sons to succeed to the property of their mother's brother :

"The opinion of the two sub-ordinate courts is in my opinion wrong. Ismail was the ancestor. He had two sons, Wahab and Nura and one daughter Mst. Jani. Mst. Jani was Khana Nashin daughter and therefore she inherited 1/3rd of the property of her father on the death of Ismail. Mst. Jani died and her 1/3rd share went to the defendants. On the death of Wahab the defendants desired to share one half of the property of Wahab. Nura was also dead when Wahab died. His sons Gani, Rasool and Razak, however, were in existence and they claimed that the entire share of Wahab should go to them. The Revenue authorities entered the names of the defendants to one half of the property left by Wahab, and hence Gani, Rasool and Razak came to the civil court and sued for a declaration that they were owners in possession of the entire property of Wahab. This declaration ought to have been granted by the subordinate courts. After the death of Mst. Jani who was Khana Nashin daughter, her sons can have no interest in the property of the subsequently deceased brother of Mst. Jani according to Shariat. According to the Customary Law also by reference to page 11 and 57 of the Tribal Custom by Sant Ram Dogra it is clear that a Khana Nashin daughter inherits only to the extent of a son the property

† Pandit Sant Ram Dogra's Customary Law page 56, question 63.
‡ Question number 69, page 59 of Sant Ram Dogra's Customary Law.

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of her father but has no subsequent right to inherit as a sister in contradiction to *shariat* law. There is no Customary Law under which a deceased sister's sons are entitled to succeed. On page 11 of the Customary Law it is definitely stated that the Customary Law is for the inheritance by a Khana Nashin daughter and no further as regards inheritance by a sister. This is made clear in answer to question 69 as regards sister and her issues. The Khana Nashin daughter's sons inherit their mothers' share but have no right through their mother to inherit any of the property of her mother's brother." Refer also the case of Rahman versus Ahmad and Mohommad, decided by A. R. C. on the 15th of Maghar, 1998.

Thus it is a settled point now that daughter's sons succeed to their mother as her sons and not to their mother's brother through their mother. Nor can they claim inheritance like other reversioners to succeed to the property of the last limited owner.†

25. A Dukhtar Khana Nashin has only a life interest in the property she inherits from her father. This property goes to her sons on her death. If she be sonless, the inheritance lapses to the agnates of her father.

Illustrations

(1) A, a muslim agriculturist, dies leaving a Khana Nashin daughter B. B inherits A's property on A's death. Subsequently B dies sonless. The property inherited by B from A will lapse to A's agnates. B's interest in the property inherited by her from A is only a life interest.

(2) A, a muslim agriculturist dies leaving two daughters B. and C. Both B and C are Khana Nashin daughters of A and husbands have been brought for them into A's house. A dies. The property of A is mutated in the name of B and C his two surviving daughters. Subsequently B dies sonless. The property inherited by B from A as a life estate shall lapse to the agnates of A. C's claim to B's property inherited by B from A as another Khana Nashin daughter of A cannot be sustained in preference to the claims of A's agnates. (6 J. & K. Law Reports page 1.)

Authority :— Mst. Noori and another versus Razak Bhatt and others decided by a division bench of the High court on

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† Prem Nath versus Ram Chand, decided by the Revenue Commissioner on the 8th of September, 1938.

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the 24th of Jeth 2002 ; Ali Rather versus Habib Ganai, 6 J. & K. Law Reports page 1.

Remark :— The theory current in the agricultural communities in Kashmir is that land ultimately belongs to the tribe or village community and in respect of ancestral immoveable property in the hands of any individual, there exists some sort of residuary interest in all the descendants of the first owner or body of owners, however remote and contingent may be the probability of some among such descendants ever having the enjoyment of the property. On this principle a woman belonging to the muslim agriculturist class does not succeed to an absolute interest under the customary law. There are, however, certain exceptions to this general rule and under certain conditions and among certain communities a woman does enjoy an absolute interest in the property inherited by her.

Authority cited : In the case of Mst. Noori and another versus Razak Bhat and others (decided by a division bench of the High court on the 24th of Jeth 2002) it was remarked: "This was a suit to set aside certain alienations made by one Mst. Noori by way of sale and mortgage. The plaintiffs who represent themselves to be the reversioners of the last male owner brought this suit on the ground that Mst. Noori had only a limited interest in the property left by her father and could not permanently alienate it. From a perusal of the pleadings it would appear to be a common ground between the parties that they are governed by a custom for the purposes of inheritance. Mst. Noori inherited the entire property and her name was mutated upon the whole even in the presence of collaterals. Even so it was contended in defence that Mst. Noori's power of alienation was unlimited.

"The court of first instance came to the conclusion that the plaintiffs had not been able to establish their case and dismissed their suit. The lower appellate court took the view that custom has been impliedly admitted in the pleadings of the parties—the custom being that females only take a limited interest-reverted to the question whether there was legal necessity for the alienations and came to the conclusion that there was no satisfactory evidence to prove that fact. In these circumstances the plaintiff's suit was decreed and the judgment of the first court overset.

"Before us it is admitted by the learned counsel appearing on behalf of the defendants that in the circumstance of the case. custom must be taken to have been impliedly admitted by the parties. Learned counsel's main grievance is that he should have been allowed an opportunity to prove that Mst. Noori could alienate the entire property during her life time. In the first ins-

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tance this position is very inconsistent with the notion of the custom prevailing in this valley as found in Sant Ram Dogra's book. Secondly, if such a custom was relied upon by the defendants it was for them to pray for an opportunity to prove it. In our opinion the issue with regard to this matter to the effect whether the power of alienation of Mst. Noori in the property in dispute is restricted clearly covers the whole ground and the defendants could lead evidence if they so choose in support of their allegation. Evidence was led on behalf of the defendants with regard to alienations by a female. From that evidence also *it is clear that it is only a life interest that is inherited by a female and that no alienation can be made without legal necessity.*"

Rivaj-i-am referred :

Question 62—What is the nature of the interest taken by a daughter in the property she inherits? Define her rights of alienation, if any, by sale, gift, mortgage or bequest.

Answer—

All Mussalman Tribes And Sikhs Except as mentioned below.

The nature of the interest of a daughter who resides at her father's home with her husband, is life interest only in the property inherited by her. This property goes to her sons, if there be any; if she be sonless, the inheritance lapses to the agnates of her father. The husband does never get a share unless the men concerned in the case, would assign to him a share by deed. A daughter is in no way, entitled to alienate her property to any one but to her own children. She can alienate her movable property by sale, gift, mortgage, or bequest.

Gujjars of All Tehsils Except as mentioned below. Daughters are entitled to alienate by gift, sale, mortgage, provided that the property is saleable or mortgageable.

Gujjars of Nandimarg: The powers of alienation are not restricted. The landed property of a daughter lapses to her father's heirs on the death of the husband, if the daughter dies childless.

Rajas of Yaripura and Uttarmachipura. Daughters do not inherit.

Sunni Mussalmans of Khanabal, Sopore Townspeople, Sunnis and Watals of Badgam The heritage of daughters is transferable. If there be issues left, they inherit it and also their husbands. It is also partitioned among other Sharai heirs. Daughters have every right of alienation. The landed property lapses to the father if daughters die childless.

Shias of Pattan. The Shariat is followed. If the daughter die childless, the landed property reverts to the donors, or agnates.

Sunni Mussalmans of Handwara. A daughter has full powers

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of alienation, if her rights of inheritance are not restricted till marriage.

Gujjars and Bakkerwals of Nunar. Daughters do not inherit so long as the agnates are alive. If they inherit a property after the death of the agnates, they have full powers of alienation; but they cannot alienate the immovable property to strangers.

Shias of Badgam and Nunar, and Srinagar Mussalmans. Daughters can alienate their property to any one whom they please.

Sikhs of Badgam. A daughter has full powers over her dowry; it is not taken back.

All Pandits. A daughter has full powers to alienate a share received by her in gift from her father. She does not inherit as a matter of course except among the Srinagar Pandits when her father dies soneless, leaving divided property.

Agnate explained : An "agnate" means a person whose relation to the deceased can be traced without the intervention of any female link. Per Mr. Justice Kilam in Ahmed Dar versus Mst. Mukhti and others 10 J. & K. Law Reports 26:- "In Mohommadan Law of Tyabji 3rd Edition, agnate is defined in section 605 on page 834, as meaning a person whose relation to the deceased can be traced without the intervention of female links. The dictionary meaning of the word 'agnate' is given as the descendant from the same male ancestor; a relative on the father's side. Sant Ram Dogra in question 69 defines 'agnate' as meaning grand father's descendants in the male line. From the definition given by Tyabji in his Mohommadan Law which is supported by Sant Ram Dogra in his Customary Law it is clear that *agnate means a person whose relation to the deceased can be traced without the intervention of female links.* Mst. Khurshi is an agnate of the father of Mst. Ashmi in as much as she is related to Qadir through male line without the intervention of any female link. The learned counsel for the appellants has been confused by reading a definition of "agnate" in the Pre-emption Law of the Punjab, but he has not noticed the fact that in the Punjab Pre-emption Act women are specifically excluded from the category of agnates whereas under the definition of agnate as given in Tyabji's Mohommadan Law and in Sant Ram Dogra's Customary Law. Mst. Kurshi comes within the category of agnate of the father of Mst. Ashmi."

26. When the post of a Lumberdar was heritable the son of a Khana Nashin daughter could even succeed to the Lumbardari of his maternal grand father in preference to his collaterals even in the life time of his mother.

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Illustration.

A dies leaving a daughter B. B is married at home. Agricultural land belonging to A is mutated in the name of B, A's daughter. A was the Lambardar of his village. Dispute arises on the succession of A's Lambardari. The right of A's collaterals could not be sustained in preference to the right of A's daughter's son even though there was no property mutated in his name.

Authority:- Mohommad versus Hussain Dar, revenue appeal number 107, of 1992. decided on the 3rd of September, 1935 by V. N. Mehta, the then R. M.

Case law referred :

In the absence of a son, the son of a Khana Nashin daughter has got a right to succeed to the Lambardari of his maternal grandfather in preference to the collaterals even in the life time of his mother who cannot hold the Lambardari herself, being a female, provided he is otherwise fit to hold the Lambardari. It is no argument in such cases to say that there is no property mutated in the name of the son and therefore, he cannot succeed to the Lambardari right in preference to the collaterals. The leading case on this subject is that of Mohommad versus Hussain Dar.† In that case the then R. M. held : "The only point that the Governor has to urge against the son of Khatji the admitted Khana Dukhtar of Mohommad Lambardar who is dead is that there is no property in the name of the son. Ordinarily the property is necessary to be vested in the particular individual before he could be considered a fit candidate for Lambardarship. It is forgotten, however, by the lower court that the whole reason of having a system of Khana Nashin daughter is to disallow all outside grafting on the stock that is exhausted. The Khana Nashin Dukhtar succeeds to her father's property during her life time and transmits the property on her death to the children of Khana Damad. The son is a protective owner of the whole property during the time of the life estate of his mother. No doubt Khatji can easily accelerate the full property in favour of son or sons by transferring a portion of the property held by her in life in trust to her male issue. If she had done that, the objection raised by the Governor would never have arisen. But in my opinion, this objection is not a strong one. We don't make a Khana Nashin Dukhtar a Lambardar and therefore, the son comes in. In my opinion, the son is perfectly entitled to be considered as the lineal descendant of Mohommad Lambardar who is dead. Lambardari is apart from

† Decided by V. N. Mehta, the then Revenue Minister, on the 3rd of September, 1935.

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Zaildari generally to be kept in the family unless the children are totally unworthy. I am loathe to allow Lambardari to be transferred away from the family if there is some one to carry out the deceased Lambardar's work....."

Lumbardar to be elected under new rules.

Under the notification forming annexure to cabinet order No. 336-C of 1956 dated 17th of February 1956 published in Govt. Gazzette dated 8th of March 1956 the office of a headman (Lumbardar) which may fall vacant by the death, resignation removal or by the vacation of his seat under any of the provisions of law in force in this behalf shall now be filled by an election in accordance with the Zialdari and Lambardari Rules of 2005 as amended under notification forming annexure to cabinet order No. 336 C of 1956 dated 17th of February 1956 provided that the collector may direct in any such case that the vacancy shall be left unfilled or when a vacancy occurs not more than six months before the next general elections are due the collector may fill such vacancy by nomination of a person who is otherwise qualified for appointment as headman.

27. Among muslim agriculturists in the valley on the demise of a Khana Nashin daughter the property devolves upon the son or the sons of the Khana Nashin daughter by the Khana Damad and if on the demise of the son or the sons of the Khana Nashin daughter by the Khana Damad the property is inherited by any of their limited heirs (e. g. a daughter) then after the demise of the limited owner the property will devolve upon the collaterals of the son or sons of the Khana Nashin daughter by the Khana Damad and not upon the collaterals of the father of the Khana Nashin daughter to whom the property originally belonged.

Illustration.

'A' a muslim agriculturist, dies leaving a Khana Nashin daughter 'B'. 'B' inherits the property of 'A' and subsequently dies leaving a son 'C'. 'C' inherits the property of his mother and later dies leaving a Khana Nashin daughter 'D' who some time after the demise of her father dies issueless. On the death of 'D' the property will revert to the collaterals of 'C' and not to the collaterals of 'A' to whom the property originally belonged.

Authorities. Mala Mahadoo versus Mala Kamal decided by a division bench of the High Court (Ganga Nath C. J. and Massud Hasan J.) on the 30th of Baisakh 2000 (12th May 1943)

Authorities cited.

In the case of Mala Mahadoo versus Mala Kamal (decided by the High Court on the 30th of Baisak 2000) their Lordships of the High Court held; "...The position

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with regard to the half that devolved upon the Khana Nashin daughter of Amir is difficult. After her death the property devolved upon her son who took it absolutely. This son namely Abdulla was not of the family of Amir but was of the family of Rasul the Khana Damad of Amir. After his death the property devolved upon his daughter Mst. Sarvi who died issuless. After Mst. Sarvi's death the property would revert to the collaterals of Abdulla (son of the Khana Nashin daughter) and not to the collateralls of Ahad or Amir....."

Khana Damad and his rights :

28. Under the customary law a Khana Damad is no heir to his father-in-law but succeeds only as an heir to his wife after her death till his remarriage or death, whichever falls earlier. On his remarriage or death the property lapses to the agnates of his father-in-law.

Illustrations.

(1) A has one daughter B. A brings C as a Khana Damad into his family. B pre-deceases A. C cannot claim inheritance of A's property.

(2) A has one daughter B. A brings C as a Khana Damad into his family. A dies. Subsequently B dies leaving no issue. C can inherit his wife's property but will lose his right of inheritance on his remarriage. On C's remarriage or death the property inherited by C from B lapses to the agnates of A.

Authority :— Satar vesus Noora, decided by P. C. Mogha, the then Revenue Minister, on the 28th of Sawan, 1956.

Remark :— A Khana Damad is a mere appendage to the resident daughter and whatever gift is made to her or to him is made for the ultimate benefit of the daughter's issue of the father's stock. On the failure of such issue the property given reverts to the kinsmen of the doner. and not to the kinsmen of the daughter's husband. The resident son-in-law would, however, keep the property for his life-time or remarriage.

Under the customary law a Khana Damad is no heir to his father-in-law but succeeds only as an heir to his wife after her death. Therefore, if a Khana Nashin daughter pre-deceases her father, the Khana Damad cannot claim inheritance of his father-in-law on his death. Even if he inherits his wife's property he loses his right of inheritance on his remarriage. Per Mr. Mogha, Revenue Minister, in Satar versus Noora † "A Khana

† Decided on the 28th of Sawan, 1996.

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Damad has under the law no right of inheritance. It is only Dukhtari Khana Nashin who inherits the property of her father and on her death her husband can certainly inherit the property. But when she herself had died before Razak and did not inherit the latter's property, Noora could not claim any right of inheritance. Even if Massamat Azizi had inherited the property and Noora had inherited on her death he would have lost the right on remarraige....."

Rivaj-i-am referred :

Question 70 —When a wife dies holding property in her own right, is the husband entitled to succeed to such property or any part of it ?

Answer

ALL TRIBES EXCEPT AS MENTIONED BELOW

When a wife dies holding property in her own right, the Khanadamad husband succeeds to such property for life only, if he does not remarry. *After his death the property lapses to the givers.*

Gujjars of Kund and Nandimarg. The husband is not entitled to inherit such a property. If the deceased have daughter, she succeeds to the deceased, the husband does not.

Rajas of Yaripora and Uttarmachipura. They follow the Shariat in the matter.

Mussalmans of Sopore. They follow the shariat regarding movable property, the land reverting to the givers, if the wife die chlidness.

Srinagar Mussalmans. If there be no heirs to the deceased in her own family, the husband inherits half of the property.

Gujjars of Chharat and Mussalmans of Achchabal. The husband gets half of the Mahar.

All Pandits. The husband inherits the property of such a wife. If there be no husband, the agnates of such a husband succeed to the property.

Rajputs of Deosar. In presence of sons the husband is not entitled to inherit the Istri-Dhan of his wife..

29. A Khana Damad inherits from his natural father provided his other brothers don't object to such succession.

Authority :— Ahad Bhat versus Ali Bhat, decided by Mohommad Afzal Khan Revenue Commissioner, on the 19th of Bahadoon, 1995.

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Authority referre

"A Khana Damad inherits from his father provided his other brothers did not object to it," remarked Mohommad Afzal Khan Revenue Commissioner in Ahad Bhat versus Ali Bhat.† "I know the custom in the valley is that a Khana Damad ceases to have connections with his paternal family when he is taken as Khana Damad in another family. Of course he could inherit from his father provided his other brothers did not object to it."

A Khana Damad can at best be an appointed heir and a widow can transfer her right in his favour. In the case of Shrimati Vidhia Vati versus Mohada Mir it has been held: "...Khana Damad is an appointed heir and within the meaning of section 63 T. A. can, therefore, succeed. Sub-section (I) of section 68 no doubt provides that an appointed heir would not succeed without consent of land-lord, but sub-section 2 provides that if an appointed heir continues to hold possession of the tenancy for a period of 3 years from the death of the deceased tenant without interference by the landlord the consent of the landlord will be presumed."

Rivaj-i-am.

Question 76 :— When a son-in-law leaving his own family takes up his residence permanently with his father-in-law as Gharjawai, what will be the effect on the rights of such son in-law to inherit (1) from his father, (2) from his father-in-law ?

Answer :—

All Tribes Except as Noted below If a Khana Damad takes up his residence permanently with his father-in-law, he inherits both his father (*in case of consent of his brothers*) and father-in-law. But the Mussalman Zamindars of Avantipura Tehsil say that a Khanadamad inherits both his father and father-in-law, whether his brothers consent to give him a paternal share or not.

Watals and Shup-Watals of Kulgam Tehsil. A Khanadamad inherits his father's estate only In view of his services as Khana Damad he is given the hand of the daughter only. He lives with his father-in-law till marriage, when he takes away his bride home.

Bomba Rajas, Rajputs of Deosar, Watals and Sikhs of Achhabal and Handwara, Watals of Pattan, Gujjars of Handwara, Bakkerwals and Gujjars of Nunar and Pandits of Pattan and Sopore. No custom.

Khanabal Mussalmans. The son-in-law inherits his father's property. His wife gets Kori-har only. A Khanadamad inherits no share.

Gujjars of Pattan and Handwara Sunnis. A Khanadamad does not inherit from his father-in-law. If there is some heritage, it goes to the daughter

† Decided on the 19th of Bhadoon, 1995.

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Watals of Handwara and all Mussalman Tribes of Sopore. A Khanadamad inherits either from his father or father-in-law wherever he mostly lives.

Other Pakhli Tribes of Nunar. Khanadamads are rare among them. He can take the share apportioned to him by his father-in-law in his lifetime in presence of his own heirs. The Khanadamad inherits his father only.

All Pandits. A Khanadamad inherits his father only; but he can get a share by gift from his father-in-law.

Abandonment of holdings :

A Khana Damad continues to have his right over the property he inherits from his father provided he does not abandon his holdings permanently. In the case of Kabir Wani and others versus Mohommad Wani, civil second appeal No. 257 of 1990 before Dalal C. J. and Sawhney J., their Lordships observed : "Reference was made to the statement of Ismail Wani, one of the Plaintiffs. He stated that Ahamad did go as a Khana Damad for a year but he came back after a year. This does not show that Ahmad had abandoned his holding and permanently gone and settled at his wife's home."

Khana Damad's rights over his wife :

30. A Khana Damad cannot subsequent to the marriage compel his wife to leave her father's house and live with him separately. Nor can he file a suit for restitution of conjugal rights against his wife. In such a case the woman has a right to refuse conjugal association on the ground that marriage was held on the footing of his pomising to be a Khana Nashin Damad and that because he had broken the promise he was not entitled to compel her to leave her father's house.

Nor can a wife file a suit for maintenance against her husband who does not live as a Khana Nashin Damad.

Authorities :— Rasool Soofi versus Mst. Asha Bibi, reported as 1936, P. L. R., J. & K. section page 104, corresponding to 38 P. L. R., J. and K. section page 104.

Case Law referred :

The law on the subject is contained in the case of Rasool Sofi versus Mst. Asha Bibi.† In this case Dalal C. J. and Qayoom J. held : "...It is true that this court may not be prepared to go to the length of the courts in British India that Rasool Sofi's promise to remain in his father-in-law's house would not debar him from obtaining restitution of conjugal rights against his wife when he wanted to live apart from his wife's father. The custom of Khana Nashin son-in-law is a recognised custom

† 1936 P. L. R., J. & K. section page 104.

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in this State and the incidence attached thereto also shall be recognised. We give no positive finding on the subject but it is possible that on a case arising in this State of restitution of conjugal rights the woman may refuse conjugal association with her husband on the ground that the marriage was held on the footing of his promising to be a Khana Nashin Damad and on his breaking the promise he was not entitled to compel her to leave her father's house. The present case, however, is different. Here the wife demands separate maintenance allowance and there is no corollary to the custom that if the husband does not continue to live as a Khana Nashin Damad he would be liable to pay maintenance allowance to his wife who continues to live in her father's house. We are of opinion that when the wife refused to leave her father's house and live with her husband she is not entitled to recover maintenance allowance."

Remark :— If owing to mutual misunderstandings between a Khana Nashin daughter and his husband the latter leaves his father-in-law's home and takes up his residence elsewhere and his wife refuses to live with him on the ground that the marriage was contracted with a condition that the husband would reside at his father-in-laws house, the wife namely the Khana Nashin daughter cannot claim maintenance against her husband under section 488 of the Criminal Procedure Code. In that event the husband is well within his rights to plead that he had offered to maintain his wife *on condition of her living with him* but that she had refused to live with him. Furthermore in case the husband refuses to pay any maintenance allowance to his wife for a period of over two years it would be a matter for judicial interpretation whether the refusal to maintain in such circumstances would amount to *"wilfull neglect"* in terms of section 2 subsection (ii) of the Jammu & Kashmir Dissolution of Muslim marriages Act of 1999 and thus entitle the wife to a decree for disolution of her marriage under the provisions of the said enactment. Likewise if the husband fails to perform his marital obligations for a period of three years it would again require an authoritative pronouncement whether the non performance of these obligations are *"without reasonable cause"* under section 2 subsection (iv) of the J. & K. Dissolution of Muslim Marriages Act of 1999 which would entitle the wife to a decree for dissolution of her marriage. So for, to the mind of the author, no case of an authoritative value has been decided in the courts in Kashmir on these points.

31. No particular evidence is required to prove a daughter being a Khana Nashin daughter, but those who rely on it

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must establish both its factum and validity in accordance with the custom prevalent in the valley.

In order to establish the factum of a daughter being a Dukhtari Khana Nashin it must be proved that the daughter continued to live at her father's house along with her husband from the day of her marriage.

In order to establish the validity of a daughter being a Dukhtari Khana Nashin it must be established that the person giving her that status was competent under custom obtaining amongst the parties to do so and that the daughter was not otherwise incapatiated to be conferred that status.

Explanation :— The fact that the daughter came to live with her father as a Dukhtari Khana Nashin along with her husband subsequent to her marriage are the circumstances in which she cannot be treated as a Dukhtari Khana Nashin.

Authorities :— Ganga Mali versus Kunga Mali, reported as 1939, P. L. R., J & K. section page 71 ; Jagan Nath minor versus Mst. Matkuji, decided by tbe High Court of Judicature on the 20th of June, 1936, corresponding to the 16th of Har, 1993.

No particular evidence is required to prove a daughter being a Khana Nashin Dukhtar but those who rely on it must establish it like any other fact whether they are plaintiffs or defendants. Where the making of a Dukhtari Khana Nashin has the effect of disinheriting the natural heirs, it must be proved by such cogent evidence as is sufficient to prove its factum and validity and not merely its probability.

Factum of appointment:

Remark 1 :— It must be noted that neither the law of estoppel nor the Statute of Limitation can make a daughter a Dukhtari Khana Nashin if she is not one. They can at best secure her in possession of certain rights which would be her's if she were a Dukhtari Khana Nashin by shutting the mouths of particular people if they propose to deny her being a Khana Nashin Dukhtar or by stopping short any suit which might be brought to eject her from her position as a Dukhtari Khana Nashin. But if it becomes necessary for a Dukhtari Khana Nashin to prefer a suit to enforce rights of which she is not in possession, she would be compelled to prove strictly the validity of her being so, excepting the special individuals who were precluded from disputing it.

Remark 2 :— The factum of a daughter being a Khan Nashin daughter can only be established if it is successful proved by cogent evidence that the daughter continued to liv

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at her father's house along with her husband from the day of her marriage. It is customary among all the muslim agriculturists in the valley that after the marriage ceremony of a daughter who is married out of the family and is not made a Dukhtari Khana Nashin, she is taken to her father-in-law's house in a *Doli* from her father's house. But when a Khana Nashin daughter's marriage is celeberated she must remain in her father's house and as is unanimously expressed by the agriculturist community in general, her *Doli* must not be taken out of the house of her father. The daughter, must continue to reside in her father's house from the very time when ceremonies connected with her marriage are over at her father's house. It is not essential that the marriage of a Dukhtari Khana Nashin must necessarily be celeberated in her father's house. But if for the sake of convenience the marriage is celeberated in the house of a near relative or neighbour of the daughter's father then after the completion of the marriage ceremony the daughter must immediately return to her father's house along with her husband. If she is taken out in a *Doli* from that house she must be brought in the *Doli* to her father's house and the *Doli* must not subsequently leave the father's house with the daughter to take her to her father-in-law's house. The fact that the daughter came to live with her father as a Dukhtari Khana Nashin along with her husband subsequent to her marriage are circumstances in which she cannot be treated as a Dukhtari Khana Nashin.

Remark 3 :— A natural incidence of the appointment of a daughter as a Dukhtari Khana Nashin is that the Khana Damad is brought permanently to live in the house of his father-in-law. The Zamindars are, therefore, generally very careful to select a proper person as Khana Damad and it is observed that a suitable boy who does not generally have much to inherit is brought into the family a few months prior to the intended marriage of the daughter as a Dukhtari Khana Nashin. If the boy is found to be suitable in all respects he is wedded to the daughter and kept in the house as a Khana Damad. All the marriage expenses of the Khana Damad are generally meted by his would be father-in-law who appoints him as such and the Khana Damad is not required to present ornaments and clothes to his wife at the time of his marriage as is generally done in normal marriages when daughter's are married out of the family without conferring upon them any special status. Thus the factum of the appointment of daughters as a Dukhtari Khana Nashin can also be established by proving that the Khana Damad was brought into the family a few months prior to the marriage, that the marriage expenses of the Khana Damad were meted by the father of the girl and that no marriage presents were brought by the Khana Damad at the time of his marriage. These are circumstances which if established should weigh greately in the

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mind of a Court to arrive at a conclusion if the factum of a daughter being a Khana Nashin daughter is established or not. It may, however, be pointed out that these circumstances shall be taken into consideration to determine whether the daughter continued to live at her father's house along with her husband from the day of her marriage. If it is established that she did continue to reside as a Dukhtari Khana Nashin from the day of her marriage the factum of her being a Dukhtari Khana Nashin must be deemed to be established. A mere recital in a *Nika Nama* that the daughter was married as a Dukhtari Khana Nashin without proving that she continued to reside in her father's house along with her husband from the day of her marriage would not be sufficient to establish her status as such. Such a recital can at best shut the mouths of such persons from contesting her status as such who may be witness to such a *Nika Nama.*

Remark 4 :— The validity of a daughter being a Khana Nashin Dukhtar can be proved firstly by establishing the competence of the person who confers upon her that status. It has been pointed out quite explicitely in article 20 of this chapter that under the latest decision of the full bench of the Kashmir High Court in a case reported as 9 J. & K. Law Reports page 195 that it is the *father of the girl alone and none else* who can confer that status upon his daughter under the custom obtaining in the valley. Therefore, if a girl is given in marriage by any person other than her father and she continues to reside in her father's house along with her husband from the date of her marriage she cannot subsequently claim that she may be treated as a Dukhtar Khana Nashin of her father. Likewise if a daughter is once married out of home without giving her the status of a Khana Nashin Dukhtar she cannot be conferred that status even though she may come to live along with her husband in her father's home.

Case law referred: Per Qayoom C. J. and Wazir J. in the case of Ganga Mali versus Kunga Mali :† "The question to determine is as to whether Mst. Ganga Mali lived in the house of Sant Ram as Khana Nashin daughter from the date of her marriage or whether she came to Sant Ram's house when she became a widow after two years of marriage ..... Keeping in view all the circumstances of the case we agree with the finding of the learned District Judge that Mst. Ganga Mali went to live in her father's house after becoming a widow and that as such she does not acquire the status of Khana Nashin daughter of Sant Ram....."

† 41 P. L. R., 1930 J. & K. section page 71.

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In the case of Jagan Nath minor versus Mst. Matkuji,† it has been held: ".....A large number of witnesses, Amarsingh, Janardhan Lal Koul and others depose to Mst Daya Mali being Khana Nashin daughter. One Sadiq Dar who lived in the village and whose father was a servant of Deva Kaul deposed that her husband came to live in Shanker Koul's house as Khana Nashin son-in-law. It was argued that from evidence it appeared that Mst. Daya Mali went to her husband's house and when she became widow she was brought to Shanker Koul's house and kept there and that this circumstance does not point to the woman being a Khana Nashin daughter. As already pointed out, the details of an event nearly half a century old cannot be proved with any exactitude. Sadiq Dar's evidence is in the favour of Mst. Daya Mali's husband coming to live at the house of Shanker Koul. We hold that Mst. Daya Mali was a Khana Nashin daughter."

Circumstances not believed:

A Nikahnama produced after over 30 years even though supported by oral evidence in which a daughter is shown as a Khana Nashin daughter cannot be relied upon if the daughter does not contest her claim as such at a proper time but does so only when there remains no male descendant of her father. In the case of Mst Farzi and Mst. Shah Mali versus Mohi-ud-din, Dalal C. J. and Sawhney J. held: "The trial court held that Mst. Zebi was not the Khana Nashin daughter of Rahim. After Rahim mutation was made in the name of his son Akbar and Subhana and when Subhana died the mutation was made in favour of Akbar. At that time no claim was made that Mst. Zebi and Mst. Khatji were Khana Nashin daughters. After the death of Akbar the name of Abdulla was entered in the record and in fact Mst. Khatji's husband was Sarbarakar of Abdulla who was a minor. At that time also the present allegation of Khatji and Mst. Zebi being Khana Nashin daughters of Rahim was not raised. Mst. Sara Banu, wife of Abdulla and mother of Sadique, is a daughter of Mst. Khatji. It is only recently when no male remained in the descent of Rahim that his plea of Mst. Zebi and Khatji being Khana Nashin daughters has been raised. It is true that a large number of witnesses came forward to depose orally that these two women were the Khana Nashin daughters of Rahim. In fact the repeated mutations during which period this had been a fact it would have been mentioned. No doubt remains in our mind that this defence is of a recent origin and not true. A *Nikahnama* of Mst. Zebi and Khatji was produced in which they were described as Khana Nashin daughters.

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† Decided by the High Court of Judicature on 29th June, 1936, corresponding to the 16th of Har, 1993.

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No reliance can be placed on a document which sees the light of day after over thirty years."

32. The factum and validity of a daughter being a Khana Nashin daughter cannot be decided by a Revenue Court. Whenever such a question arises it is the duty of the Revenue Court to ask the parties to agitate the matter in a proper Civil Court having jurisdiction to decide the point.

Authorities :— Mst. Azizi versus Sidha, decided by the Revenue Minister on the 3rd of Bahadoon, 1995 ; Mst. Ashmi versus Jani decided on the 11th of Asuj, 1989 by the High Court of Judicature ; Razak versus Rahmati, decided on the 15th of June, 1934 by V. N. Mehta, the then Revenue Minister ; Ismail Dar versus Mst. Himiti decided on the 10th of Jeth, 1993.

The factum and validity of a daughter being a Khana Nashin daughter cannot be decided by a revenue court. Whenever such a question arises it is the duty of the revenue courts to ask the parties to agitate the matter into a proper civil court having jurisdiction to decide the issue. If the matter is one relating to mutation proceedings a revenue court should make enteries in the revenue records in accordance with possession of the land provided that no such entery shall be made in the name of a person who is, *per se*. a trespasser. In the case of Mst. Azizi versus Sidha,† Sir Lal Gopal Mukerjee remarked: "It is beyond the province of the Revenue courts to decide a question of title. The Governor had virtually held that Mst. Azizi by marriage has forfeited her right to the property and she should be ousted. Even if she has no title she is in possession and on that ground alone her name should continue to be on record."

Per Dalal C. J. and Sawhney J. in the case of Mst. Ashmi versus Jani :‡ "The question at issue is whether Mst. Ashmi is the Khana Nashin daughter of Mohommad and thus entitled to succeed by custom to Mohommad's Assami right. Mst. Nooree is also dead. The best course of the Revenue Officers would be to retain the name of Mst. Ashmi until the opposite party obtains a declaration of right. In a case of this nature the revenue courts ought not to undertake decision whether Mst. Ashmi is a Khana Nashin daughter or not. She is in possession and the opposite party desires to have her name removed from the village record and to take possession from her. Such a matter should be decided by the civil courts."

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† Decided by the Revenue Minister on 3rd Bahadoon, 1995.
‡ Decided on 11 Asuj, 1989.

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V. N. Mehta esq. Revenue Minister in the case of Razak versus Rahti.† ".....I as a court of records hold that complicated questions of the nature of a person being a Khana Nashin Dukhtar or not need not be gone into at this stage. This can best be gone into in a Civil Court where evidence can be led to show whether Mst. Rahti was a Khana Nashin daughter of her father or only one of the daughters who devastate her property as soon as she marries....."

When a daughter seeks that she should be declared a Khana Nashin daughter and prefers a suit in a civil court, it is essential for her to make a prayer for a declaration that she is a Khana Nashin daughter. She may, however, be allowed to amend the plaint in the original court if no such prayer has been made but she cannot be permitted to re-agitate the whole matter in second appeal by claiming herself to be a Khana Nashin daughter. Per Sawhney J. in Ismail Dar versus Mst Himiti‡ : ,,... ... ...What the plaintiff really desires was that Mst. Khatji should not be deemed to be a Khana Nashin daughter of Satar Dar. I might have possibly allowed the plaint to have been amended if I had been hearing the suit as an original court and possible even as a first appellate court. In the lower court of appeal it has been admitted by the plaintiff's counsel that there was no prayer for a declaration that Khatji is not a Khana Nashin daughter of Satar Dar and that a reference to this allegation is made in the plaint for a different purpose. I cannot allow the whole matter being re-agitated now."

† Decided on the 15th of June, 1934.
‡ Decided on the 10th of Jeth. 1993.

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Adoption

The author of this book seems to be ignorant of Mohamadan Law, therefore taken for granted & presumed the validity of adoption in Muslims. Under Mohamadan adoption is not recognised at all. The readings hereunder will show what Islam says:—

Mohdan Law by Tyabji

Page 267 A form of adoption seems to have been vogue in Arabia, previous to Islam, based either on a sense of Comradeship in arms, based either on a sense of Comradeship in arms, or on blood-wile and blood feud. This Continued in the early days of Islam as a substitute for, or rival to blood-Kinship. So it was at first laid down:—

Section 60/ Section 225; Subject to S. 226 (Muslim Endowments) Paternity or maternity is not established in a Muslim who purports to adopt another, nor is the latter Considered in Law to be the child of the former.

Quran viii, 72:— "Verily those who believed and emigrated and striven with their substance and lives in the way of God, and those who took them in & helped them: these shall be near of kin, the one of them to the other"

Such persons were at the start deemed to Constitute a group or family of their own, inheriting to each other. This was abrogated by the verses preferring Consanguinity to any artificial modes of creating ties not based on actual Parentage

Quran xxxiii-4-6:— "God hath not assigned unto any man two hearts within his body, nor hath He made your wives, whom ye declare (to be your mothers) your mothers, nor hath He made those, whom ye claim (to be your sons) your sons. This is but a saying of your mouths." ... "But God speakes the truth and shows the way. Call them after their fathers. This will be more right before God.

Page 5 (introduction) The reforms introduced by Islam were such as to bring about Complete transformation of the society of Arabs. So Conscious were the Arabs themselves that they began to refer to the period before Mohamad as the period of ignorance or wildness or savagery in antithesis to the moral reasonableness of the Civilised man.

It was natural to think with horror of the days of superstition and idolatry, when the widow formed part of the estate of her deceased husband and Could be inherited like Chattels and goods and when daughters were buried alive.

Page 820 "And lie of war, or rather of joint-plunder or revenge was more important than family ties in early Arabs"

"Logical Completeness of Mohamadan Law:— Sir William Jones said:— "I am strongly disposed to believe that no possible question Could occur on the Mohamadan Law of succession which might not be rapidly and correctly answered."

Customs & usages .... Prevail in so far as they have not been altered or abrogated by the rules of Quran or teachings of the prophet.

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CHAPTER VII.

APPOINTMENT OF AN HEIR

Origin and meaning :

In the minds of the Greeks and Romans there were three things closely and at first inseparably connected,—the family organisation, the family worship (i. e. the worship of the dead ancestors of the family back to the common ancestor of the group of families constituting the clan) and the family estate. It was the rule in both Greek and Roman law that the property could not be acquired without the obligation of the cultus, nor the cultus without the property or some share in it. It was imparative that the family should not die out and the family cultus thus become extinct. To the ordinary Greek sentiment, neglect in the grave was a calamity almost as much to be dreaded as the total omission of sepulchral rites. Hence the prayer of the pious for children, as a guarantee that the spirit should not be *'an unfed and famished citizen of the other world, for lack of friends or kinsmen on earth'*. It was, however, a principle equally fundamental that the family and the cult could be continued only through males; a daughter could not continue the cult, because on marriage she passed into her husband's family. A legitimate son was, therefore, the prime object of marriage. It was from these principles that the regulations concerning inheritance and the institution of adoption sprang.

Agnate & Cognate is different from what in Roman Law, under the Mohamadan Law. under the Hindu Law Agnates are those Persons, descended from a Common male ancestor. And Cognate are those descended through a Common ancestor but through at least one female link (see Page 3 Mohamadan Law by Tyabji)

The institution of adoption was thus a necessary outcome of the desire to perpetuate the family and the family cultus. 'Adoption is the factitious creation of blood relationship and is the earliest and the most extensively employed of legal fictions.

The adoption of a son amongst the Aryan Hindus, as observed by Sir R. West, is essentially a religious act. The ceremonies in an adoption, as described in the Sanskrit law books, resemble the formalities at a wedding; adoption consisting like marriage in the transfer of paternal dominion over a child which passes to the adopter in the one case and the husband in the other.

under Hindu Law

Hindus : by N.R. Raghava Chariar. Page 87 ... the foundation of the Brahmanical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnisation of the necessary Rites. (1933 P.C. 155)

The code of Manu has a fanciful derivation of the word *putra*, 'a son' as denoting the deliverer from the infernal region called *'put'*. In the same way it is declared by Vashishta that if a father sees the face of a son born and living, he throws his debts on him and obtains immortality. Another ancient text says: 'Heaven awaits not one who has no male issue' These and other texts laudatory of the celestial bliss derived from the male issue, are cited by eminent commentators in support

Adoption may be defined as the formal affiliation as a son of a person, of one who is in fact not his son. Page 88

Hindu Law is due to the Superstition of the Hindus that a male child will secure one Common benefit from his ancestors (1931 Mad 549) Hindu also to the Secular desire for the perpetuation of family property (1915 P.C. 7)

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of the obligation to adopt on failure of male posterity. The importance of this practice was enhanced by writers on adoption, who declared as absolute in the present age (*Kalijuga*) the ancient devices for obtaining a substitute for a legitimate son of the body, such as appointing a widow to raise issue to her deceased husband, or a daughter to her sonless father, or legitimatizing the illegitimate son of one's wife etc. These writers are unanimous in declaring that none but the legitimate son of the body (*aurasa*) and the adopted son (*dattaka*) are sons in the proper sense of the term and entitled to inherit.

Apararka :

Apararka or Aparaditya was one of the great commentators on the Yajnavalkya Sumrita and his work is considered to be of paramount authority in Kashmir. (Refer Mayne on Hindu Law and Usage page 43) According to him adopted son alone is recognised as substitute for the son of the body in the *Kali* age Apararka writes : "Of the different substitutes of sons, the adopted (dathaka) son alone is recognised in this (Kali) age. For, referring to the laws abrogated in the *Kali* age, Sannaka says :- 'The different classes of sons other than the begotten (aurasa and the adopted (dattaka) are not recognised in this age.' Refer also Tagore Law Lectures for 1880 contained in Professor Sarvadhikaris Hindu Law of Inheritance (2nd edition page 403).

Almost the whole of the Sanskrit law of adoption is evolved from two texts and a metaphor. The metaphor is that of 'Caunak' that the adopted boy must be a reflection of the natural born son which is *'putra chaya'*. The texts are those of Manu and Vashishta. Manu says :— "He whom his father and mother give to another as his son provided that the donee have no issue, if the boy be of the same class and affectionately disposed is considered as a son given—the gift being confirmed by pouring water."

Vashishta says :— "A son formed of the seminal fluids and of blood proceeds from his father and mother as an effect from its cause. Both parents have power to give, sell, disown or desert him. But let no man give or accept an only son since he must live to raise up a progeny for the obsequies (last funeral rites) of his ancestors. Nor let a woman give or accept a son without the consent of her lord. He who means to adopt a son must assemble his kinsmen, give humble notice to the King and then having made an oblation to fire with words from the Vedas, in the midst of his dwelling house, he may receive as his son by adoption a boy nearly allied to him, or (on failure of such) even one remotely allied. But if doubts arise (as to his caste) let him treat the kinsman as a Shudra. The class ought to be known, for through one son the adopter rescues many

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ancestors. If after he has been adopted a ligitimate son be born then the adopted son shall be participater of a fourth share."

The essence of the Hindu adoption being true sonship all the rules regarding it are intended to give effect to this idea. The person adopted must be mere infant. His mother must be a person whom the adopter could have married; there is a formal transfer of the *patria potestas* from the natural to the adoptive father; there is the same religious ceremony as at the birth of a son; in short, the only difference between the adopted and the natural boy is one which cannot be obliterated—the birth itself.

Mohommadans :

In Arabia in the days of Prophet Mohommad, a man could adopt another person as his son (Arab *tabbana*). The Prophet himself adopted Zaid *ibn* Haritha. The latter was carried away in his youth as a slave and came into Mohommad's possession in Mecca. Some of his own tribesmen recognised Zaid, and told his father Haritha, who went to Mecca to offer a ransom for his son. Zaid, however, chose to remain with the Prophet upon which the latter gave him his freedom and adopted him as his son saying: "He shall be my heir and I his". Since that time he was called Zaid *ibn* Mohommad.

see page 146 Ignorance of M. Law

Many other instances of adoption are known in Arabic literature. But as a rule it does not appear that in Arabia adoption was practised exclusively for the purpose of saving the family from extinction. Often the idea apparently was merely to incorporate a certain person into a family, for one reason or another; *e. g.* when a man on marrying a woman who already had children as his own.

It is understood that at that time an adopted son was regarded as in all respects the equal of a real son. But later on the verses of the *Quran* were revealed in which it was expressly announced to the faithful that an adopted son was not a real son, so that to call an adopted son a real son was wrong, in as much as the process of adoption could never create any bonds of blood relationship.

This passage of the *Holy Quran* has been the accidental cause of adoption not being regarded in the orthodoxy of *Islam* as a valid institution with binding legal consequences.

Adoption in Kashmir :

The law of adoption as it exists in Kashmir has got its own special features. It is fundamentally unlike the true Hindu Law which requires that certain conditions must be fulfilled before a boy can be admitted in adoption. According to the notions prevailing amongst muslim agriculturists living in the valley

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adoption is in no sense connected with religion and partakes more of the character which the act assumed in the later Roman Law as a simple *nominis heredis institution* ; that is to say, it is more or less a public institution by a sonless owner of land of a person to succeed him as his heir. It is, therefore, more correct to speak of the personal relation thus formed as the *'appointment of an heir'* rather than adoption which has a history of its own and which suggests features altogether wanting in the ordinary customary appointment of an heir with which we are familiar among Muslim agricultural communities in Kashmir. The institution of an heir is no doubt a mere substitution for adoption, the effect of which is to vest the succession in the instituted heir from the death of the testator.

The customary observance of making adoption is certainly not due to the spiritual benefits of sonship but the practical benefit that will accrue to a sonless man for having some one to live with him and manage his land. In return to this obligation the sonless man offers the right of succession to his land.

In Kashmir adoption is a purely secular arrangement. The customary adoption of the agricultural tribes of Kashmir has no real connection with the adoption of Hindu Law ; the latter is based on the idea of spiritual, the former on the idea of purely *Practical and temporal benefit*. It must, therefore, be clearly noted that what is called adoption under Customary Law has little or no connection with the adoption of Hindu Law. None of the agricultural tribes in Kashmir require any religious ceremoney as essential for the validity of an adoption. This cannot, of course, be said generally of the Hindus of towns who, in many cases, follow Hindu Law. It has been remarked in *Indar Singh versus Mst. Gurdevi* reported as A. I. R. 1930 Lahore page 897 that generally speaking, it is as true today as in 1893 when Sir H. M. Plowden expressed the same view in Ralla versus Budha (50 P. R. 1893) that among agricultural, tribes and according to the Rivaj-i am adoption is founded on no idea of spiritual benefit, which is the under-lying principle in Hindu Law, but on the practical benefit of companionship and assistance." This remark contained in a case from Punjab is applicable to the agricultural tribes of Kashmir as well.

Even amongst Hindus Caunak's Metaphor is altogether disregarded and, therefore, a sister's son, or a daughter's son, who cannot be adopted under the strict Sanskrit law of adoption are freely taken in adoption. Nor is adoption confined to Hindus of the valley alone. Even Mohommadans and Sikhs are in the habit of adopting and such adoptions are sanctioned by their customary observance of the adoptee being treated by the adopter as his natural born son. But with them the object is simply to

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make an heir. *The religious notions of a mystical second birth is not imposed into the transaction.* No religious ceremonies are used. Nor is there any exclusion of an only son, or of the son of a daughter or of a sister. "The fact that adoption is unknown to the Muslim Law is unknown to the Mussalmans of the valley. Adoption is of the Hindu origin, and has been maintained among the Mohommadans in the valley in spite of all the bigotted attacks against this institution for the past six hundred years. The Zamindars of the valley still think an adopted son as good an heir as a real son. No gifts are ever announced in their favour which some learned *Maulvis* desire to be made in all such cases to legallise the inheritance by the *Shariat* as well."†

For several years past it has been the cherished desire of the orthodox Mussalmans of British India and the valley that Customary Law should in no case take the place of Muslim Personal Law (*Shariat*). They regard Customary Law as a misnomer in as much as it has not any sound basis to stand upon and is very much liable to frequent changes. They think that Customary Law cannot attain at any time that certainty and definiteness which must be the special characteristic feature of laws. The matter was, as such, agitated by these orthodox *Maulvis* in British India both in press as well as at the platform with the result that the Muslim Personal Law (*Shariat*) Application Act XXVI of 1937 was passed. This Act has not been made applicable to questions relating to agricultural land (Section 2 *Shariat* Act) in as much as section 2 of the act says, "*save* questions relating to agricultural land etc.". The same feelings prevail amongst Mohommadans living in towns and the city of the valley but no statutory provisions have been made in this regard as yet. Even at present in regard to this old existing custom of adoption, the Mussalmans of the valley living in towns and the city have a strong desire to discard it altogether on the ground of its already having been discarded by the Prophet in Zaid's case.‡ But as it has already received the customary sanction by a long ancient observance the intention is to taint the whole affair by some such means as to make it in accordance with the orders of the *Shariat*. They say that an adopted son may be taken by a sonless man but he cannot inherit his property unless the adoptive father gives it to him by *gift* or *will*. This has not as yet received any judicial sanction but is simply a cherished desire of the orthodox Mussalmans of the valley.

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† Pandit Sant Ram Dogra's Code of Tribal custom page 6.
‡ Quran 39 iv, Palmer's Translation.

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Essentials of adoption.

The essential requirements for the validity of an adoption are: (a) its validity, and
(b) the factum of adoption.

No adoption can be recognised as valid untill the boy has been adopted *in fact*. Similarly even if it is that a boy was actually adopted, but it appears that adoption was not valid by custom, adoption is liable to be set aside at the instance of the person competent to contest.

33. A sonless proprietor of agricultural land may appoint one of his kinsmen or tribesmen to succeed him as his heir. The appointed heir is called a pisar-parwardah and has for the purposes of succession to the appointer's property the same rights and liabilities as if he were a natural born son of the appointer.

Exception:— Pandit Sant Ram Dogra in his code of Tribal Custom in Kashmir in answer to question No. 75 writes that among Gujjars of Sopore and Bomba Rajas no adoptions are ever made.

Illustration

A, a Muslim agriculturist, appoints B as his son. B shall succeed to the property of A in accordance with custom prevalent in the valley although no relationship is created between A and B under the strict Mohommadan Law.

Authorities:— Ahad and Rahman versus Karim, decided by the Revenue Commissioner on the 21st of Bahadoon 1995 ; Subhan, Gani etc. versus Abdulla, decided by the Revenue Minister on the 19th of Sawan, 1996 ; Sultan Wani and Khizar Wani versus Mohommad Wani and others, decided on the 10th of Bahadoon, 1993 by the High Court of Judicature; Habib and others versus Ahmad and others, decided by the Revenue Minister on the 12th of Sawan, 1998; Rasool versus Khaliq, decided by the Revenue Minister on the 25th of August, 1937; Rasool versus Akbar, decided by the Revenue Commissioner on the 22nd of Sawan, 1995; Guffar adopted son of Mst. Mali of Awantipura versus Ramzan and Ali, decided by the Revenue Minister on the 9th of July, 1938.

Remarks:— The law of adoption though of the Hindu origin is in no sense connected with religion according to the notions prevailing amongst agriculturists of the valley. It is more or less a public institution by a sonless owner of agricultural land of a person to succeed him as his heir. The appointed heir is called a pisar-parwardah. Amongst Mohommadans of the valley

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at the time of adoption relations are invited home to fetch the boy for adoption. Female members of the family and relations also accompany the party among the zamindars but that is not customary amongst the more respectable classes Amongst the Hindus the sacred thread ceremony and the marriage ceremony of the adopted son are performed in the adoptive parents home and in case in which the adopted son belongs to a different gotra it is regarded that these rites of adoption *must* be performed in the house of the adopted. By these rites the adoption which is performed by taking the adopted son into the lap, is completed. "After the performance of these ceremonies, it is not in the power of the adoptive parents to return the adopted son to his natural parents. Even if he is returned to his natural parents he gets his adoptive parents heritage and not that of his natural parents."†

Question 75:—State the custom relating to adoption: Rivaj-i-am.

Answer—

ALL MUSSALMAN TRIBES AND SIKHS EXCEPT AS MENTIONED BELOW.

He, who has no male issue, adopts a son. At the time of adoption, relations are invited home to fetch the boy for adoption. Female members of the family and relations also accompany the party among the zamindars; but it is not so among the respectable people.

Garments are taken by the adoptive father for the boy and his brother among the zamindar, but among the respectable class of people natural father of the son presents him with new suits of clothes on the accasion. Relations of both the fathers of the boy are given a feast at the house of the adoptive father.

Gujjars of Sopore and Bomba Rajas. No adoption are ever made.

All Pandits. Adoption is so general from time immemorial that it has multiplied its formalities as follows:—

1. (a) In adoption giving and taking formally is essential, *i. e.* the natural father of a son gives and the adoptive takes him into his arms in the presence of the near kindred, prohats and neighbours of the parties.

   (b) Giving in adoption of a son is practically the same as the Sanklap of a daughter in marriage or gift of a cow to a Brahman. No sooner is the son received for adoption than he is not allowed to remain in his natural parent's home so that he may conduct himself to his adoptive parents on his majority as a man of their tribe and brotherhood.

† Pandit Sant Ram Dogra's Code of Tribal Custom page 60.

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(*c*) If the adopted son be of the same family or Gotra, only verbal declaration of adoption is considered sufficient. Performance of rites is not necessary.

(*d*) If the son to be adopted is to be taken from a stranger's house' the adoptive parents dress the son in their own clothes in the natural father's home, and the natural mother gets something in cash or in ornaments as a compensation for suckling the son so that no rights of the natural parents may remain in the son.

Rivaj-i-am continued.

Just after adoption, the son is taken home by the adoptive parents. His Gotra and caste are transformed into those of the adoptive parents in a way that he is no more in his natural house and has got a rebirth in the adoptive parent's home.

For this very reason, no distinction is made between natural and adopted sons. The ten Sanskars (rites) which are performed on the birth of a son are performed on adoption by the adoptive parents. The sanskar (rite) of bringing milk by a daughter-in-law when pregnant to her father-in-law's home is similarly performed by the adoptive mother, so also the rites of Nama-Karma (nomination) and Zata-Karma (conversion) to the caste are performed on the eleventh day of adoption, if circumstances of the family permit or they are postponed to some other day.

Tonsure ceremony, investiture with the sacred thread and marriage, etc., ceremonies of the adopted son are performed in the adoptive parents' home. It is by these rites that the adoption which is performed by taking the adopted son into the lap is completed.

Thus after performance of these ceremonies, it is not in the power of the adoptive parents to return the adopted son to his natural parents. Even if he is returned to his natural parents he gets his adoptive parents' heritage and not that of his natural parents.

(2) Among the Pandits, there is another kind of adoption in which the ceremony of giving and taking does not occur at all. Only nomination of boy as an adopted son is made, *i. e.* a person nominates his own son or the son of a relative as an adopted son of a man, who is dead or is absent from home.

Sons are adopted in this way only for the performance of Kriya Karam (obsequial rites) and inherit, in case the heirs of the deceased consent.

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(3) Adoption according to Law with the sanction of His Highness as in case of Jagirdars.

(4) In adoption, the Kashmiri Pandits do not follow the Dharama Shastra, but the Customary Law. A widow is so far empowered in adoption that the collaterals or the brothers of her deceased husband cannot interfere in it. The husband cannot adopt a son without the consent of his wife.

A son adopted by a widow long after the death of her husband can inherit his property, though it may have been held jointly by the family and acquires the rights of his adoptive mother."

Onus on party denying the existence of custom of adoption :-

As the doption of an agnate is allowed by Hindu law as well as by the custom prevailing generally amongst Hindus in this province, the initial *onus* of proving that the custom of adoption does *not exist at all* in the parties' tribe, should be laid on the party so denying the existence of the custom.†

Adoption when construed as gift :

The adoption of a son or the appointment of an heir under the Customary Law of the valley, is usually intended to make provision for succession to the adoptive father's property after his death. In some cases no doubt the adoptive father makes a gift of his property at the same time to the appointed heir, but this is not always the case. "In each case a deed of adoption must be construed according to its language and in the light of attendent circumstances. In some cases a deed of adoption must be construed as a deed of gift while in others a gift *inter vivos* may not be contemplated, and the adoptive father's intention may simply be confined to the appointment of the adopted son as his heir, who would, as such heir, succeed to his property after his death."‡

Gift to person whose adoption is invalid

Where a deed contains a testamentary disposition in favour of a person believed to be the adopted son, it is a question for consideration whether on the failure of adoption the gift also fails. The court has to decide in each case after considering the language of the document and the surrounding circumstances whether the adoption was the reason or motive for making the gift or bequest, or whether the mention of the donee or legatee as an adopted son was merely descriptive of the person to take under the gift or bequest and he was to take the property even though his adoption may not be valid.¶ If the intention

† 1924, 5 Lahore 409.
‡ 63 P. R., 1912 ; commented on by Shadi Lal C. J. in 1923, 4 Lahore 356.
¶ 1923, 4 Lahore 356.

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is to benefit the donee as *persona designata* (*i. e.,* a designated person) though described as adopted son, the addition of his supposed relationship is merely a matter of description, and the gift prevails though the description is incorrect. But if the assumed fact of adoption is *'the reason and motive of the gift and indeed a condition of it',* then the gift cannot take effect if the adoption is pronounced invalid.†

34 Generally no one can adopt who has lineal descendants. The existance of a daughter's son can be no bar to adoption.

Explanation 1 :— A person shall be deemed to be 'sonless' within the meaning of this article if his son has entered a religious paternity and has abandoned wordly affairs.

Explanation 2 :— Among all Hindus the words 'male lineal descendants' mean and include, a son, son's son and a son's son's son.

Exception 1 :— A father can adopt a son, if his natural born son be a leper, insane, retired from life (world) or lost

Exception 2 :— Amongst Pandits of Srinagar if a man has a son by one wife and the other wife be childless, such a wife can adopt a son in presence of the sons or the grandsons to her husband by other wives.

Remark 1 :— The object of making an adoption is the satisfaction of a sonless person's secular or spiritual needs. If the person is already possessed of a male lineal descendant, he does not need to bring an outsider as his own son and make him a sharer of the property of his natural born son, son's son or son's grand son after his death.

Remark 2 :— The purpose of adoption being to satisfy the secular or spiritual needs of the adopter, the right to make an adoption is not effected by the fact that the appointer is possessed of a son who is a leper, insane, retired from life or lost.

Amongst agricultural tribes little regard is generally paid to the idea of having some one to perform the exequial rites, but among some of the Hindus it is recognised that a man who has a male issue may adopt if such *issue be an absolute outcast.*

Remark 3 :— The instances specified in exception 2 above are so rare that the author of this treatise has not been able

† Refer the cases cited by Mulla in his Digest of Hindu Law on page 472.

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to substantiate the proposition with any decided case law on the subject. A complete reference from the Rivaj-i-am which incorporates the custom has, however, been quoted below in extenso.

Question 75 (a)— Is it necessary that the adopter should be destitute of a son, a son's son, and a son's grandson? Is a daughter's son a bar to the right of adoption? Rivaj-i-am.

Answer—

ALL TRIBES EXCEPT AS NOTED BELOW.

No adoption is made. A daughter's son is also adopted, but he is not a bar to adoption.

All Sikhs except those of Baramulla and Badgam saying that they do not adopt a daughter's son.

Pandits of Nunar further explain the rite by alleging that if a person's own son or son's son be a cripple or an idiot, he can adopt a son.

Bomba Rajas of Uttarmachipura, Gujjars of Sopore And Nunar Bakkarwals of Nunar and Sunnis of Srinagar. No custom.

N. B.—Srinagar Mussalmans have said this simply out of bigotry, otherwise adoption is freely made in the town Mussalmans though Tamlik is made in their favour to stick to the old customary inheritance and carry out the orders of the Shariat.

Pandits of Srinagar. A person cannot adopt. A daughter's son is no bar to adoption. But if a man have a son by one wife and the other wife be childless, such a wife can adopt a son in presence of the sons or the grandsons to her husband by other wives."

Question 75 (b)— May a man adopt who has male issue, if such sons be disqualified by any legal impediment (such as loss of caste from performing the obsequial rites?

Answer—

ALL MUSSALMAN TRIBES EXCEPT AS MENTIONED BELOW.

A father can adopt a son, if his real son be a leper, insane, retired from the world and lost. The Mussalmans do not adopt sons for performance of obsequial rites, but to have a substitute of theirs in the village community.

They can adopt a son in case of irreligion of their own natural son, but there is no such an instance.

All Hindus. Yes, he can adopt a son. Though the Sikhs of Handwara and Achhabal state there is no example of the kind among them.

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35. The custom of a daughter's appointment is recognised in some of the families among the Muslim agriculturits of the valley. But those who rely upon the existence of such a custom must allege and prove that such a custom exists in their families.

Authorities :— Mst. Khatji daughter of Ahad Dar varsus Nur Dar son of Salim, decided on the 8th of August, 1943 by the Revenue Minister; Reshu minor, versus Mohommad and Sultan, decided on the 16th of Bahadoon, 1994.

In the case of Khatji versus Nur Dar, Mr. V. N. Mehta held as under: "The question for consideration is not whether there is a custom allowing a daughter to be adopted as Dukhtar Parwardah, but of a fact whether Mst. Khatji was treated as dukhtari parwardah by Ahmad. The will shows that the father did treat Mst. Khatji as his Parwardah daughter and left the property to her. In these circumstances Noora and Lala, brothers of Ahmad deceased, cannot raise the question that there was no custom of adoption of daughter in their family. Ahmad did treat Khatji his Dukhtar Parwardah and left his share by will to her. In these circumstances, I don't think the point raised by the Governor has any force. A will need not be registered. I have read the will. It merely described Khatji as his adopted daughter. But there is no mention that Ahmad had adopted her." Similarly in the case of Reshu minor versus Mohommad and Sultan‡ on the death of Karim mutation was attested by the Tehsildar of Baramulla in favour of Mst. Ashi Parwardah Dukhtar of the deceased and Reshu.

36. An expresssion of a clear intention on the part of the adoptive father to adopt the boy concerned as his son coupled with the performance of the obligatory customary formalities is sufficient to constitute a valid adoption. But no adoption shall be invalid simply because publicity has not been given to the fact if the adoption has been made in some unequivocal and customary manner.

Explanation :- An intention on the part of the adoptive father may be proved either by a formal declaration before the brotherhood ; or by excuting a written declaration either preceded or followed by some treatment consistent with a deliberate appointment ; or by a long course of treatment evidencing an unequivocal intention to appoint the specified person as heir.

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‡ Decided on the 16th of Bahadoon, 1994.

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Illustration.

A, a Kashmiri widow, adopts a son for herself and her deceased husband in contravention to the wishes of her father-in-law. Giving and taking is not proved. The adoption is invalid.

Authorities :— Maheshwar Dhar versus Mst. Jai Mali and Shamboo Nath, decided on the 30th of Bahadoon 1979 and reported as J. & K. rulings, 1979-91 section, page 30.

Remarks :- An effect is to be given to the intention of the appointer. But merely an intention is not sufficient if the obligatory ceremonies are not performed. For instance in the case of Hindus if giving and taking has not taken place in accordance with the local customs, the adoption *cannot* be held good in the eyes of law.

Estoppel by conduct:

Doctrine of Estoppel : The doctrine of estoppel by conduct has been applied in India to cases of invalid adoptions. The objecting party may be estopped from disputing the adoption where *he had himself not only acquiesced in it, but has encouraged it and concurred in it at the time it took place,* or had, by treating the adopted son as a member of the family, induced him to abandon the right in his natural family, which he might otherwise have claimed.†

The following few principles have been laid down by the High Court of Judicature in the case of Maheshwar Dhar versus Mst. Jai Mali and Shamboo Nath.‡

"It would perhaps be advisable to lay down a few general principles according to which evidence in cases such as the present, may be judged and appraised. In questions effecting family relations e. g., adoption, marriage, divorce, dower, legitimacy etc., the parties themselves and their near relations are not only competent witnesses but the best ones to depose to the facts and circumstances for obvious reasons. Their knowledge is generally firsthand, full and detailed as no outsider can generally possess. While, therefore, allowance may and should be made for their bias and partiality, the evidence of relations should not be rejected as *per se* unreliable simply because of their relationship which exists not unoften with both parties to the suit. When again hearsay evidence is to be distinguished from

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† Mayne's Hindu Law, 7th edition, page 208 ; 1919, 1 Lahore at page 34.
‡ Decided on the 30th of Bahadoon, 1979 and reported as J. & K. Rulings, 1979—91 section, page 30.

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the evidence of repute, 'A' may be known as the adopted son of 'B' by general repute. This repute is generally based on the habitual course of conduct between A & B and members of their family—but the evidence of a third person cannot be rejected as hearsay when he deposes as to what he has known as to the existance of such relationship. This so called opinion may be of any person who has special means of knowledge on the subject—such as the priests, prohits or friends of family.† Then again adoption being a proper act under the Hindu Law, if for a number of years, a person is accepted and treated as the adopted son of another, it should be presumed that everything necessary to render the adoption valid had been performed.‡ Too strict a proof of the details of the ceremonies performed at the time of adoption cannot, therefore, be demanded after a long time. And lastly, I think it may be taken as a well-settled principle that amongst Kashmiri Pandits, as in the Punjab, religious rites are not essential to constitute a valid adoption that *the really important thing is the unequivocal intention to adopt and the treatment of such adoptee as such*—vide Mayne's Hindu Law, 7th edition sections 153-154; 75 Punjab Weekly Reporter 1913."

37. Among the Muslim agriculturists and Sikhs of the valley an intention on the part of the appointer may be proved by a deed of adoption or a deed of will executed by the appointer in favour of the appointee coupled with the possession of the appointer's property.

Authorities :— 8, J. & K. Law Report page 42; Ahad and Rahman versus Karim, decided by the Revenue Commissioner on the 21st of Bahadoon, 1995; Subhan Gani etc. versus Abdulla, decided by the Revenue Minister on the 19th of Sawan, 1996; Mst. Khautani versus Wahab Lon, order of His Highness dated the 6th of May, 1930; Sultan Wani versus Khizar Wani and Khizar Wani versus Mohommad Wani and others, decided on the 10th of Bahadoon, 1993.

Remarks :— No particular evidence is required to prove an appointment and those who rely on it must establish it like any other fact whether they are plaintiffs or defendants. Where an adoption has the effect of disinheriting the natural heirs, it must be proved by such cogent evidence as is sufficient to prove its *factum* and *validity*, and not merely its probability.

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† Section 50 Evidence Act.
‡ 14 Moore's I. A. page 67.

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If a declaration of adoption in a particular deed by its own force would confer upon a person the status of an adopted son, the mere fact that the person had set up a different adoption which he failed to prove, would not take away from him the status which arose under the deed and would not disentitle him to claim a relief on the basis of the deed. (Refer 8 J. & K. Law Reports page 42).

It must be clearly noted that neither the law of estoppel nor the Statute of Limitation can make a person an adopted son if he is not one. They can secure him in the possession of certain rights which would be his if he were adopted, by shutting the mouths of particular people if they propose to deny his adoption or by stoping short any suit which might be brought to eject him from his position as adopted. But if it becomes necessary for the person who alleges himself to have been adopted to prefer a suit to enforce rights of which he is not in possession, he would be compelled to prove strictly the validity of adoption as against all persons, excepting the special individuals who were precluded from disputing it.

Case Law of Kashmir cited :

There is a large number of decisions of the highest revenue courts in the valley in which it has been held that for the purposes of mutations a registered deed of will coupled with the possession of the adopted son of the adopted father's property is sufficient to prove beyond all doubts that a particular individual is a pisar-parwardah of the appointer. Per Raja Mohommad Afzal Khan Revenue Commissioner in the case of Ahad and Rahman versus Karim.† "Karim is mentioned as pisar-parwardah of Habib in the registered deed and he is in possession of the land. Hence the subordinate Revenue Officers are justified in sanctioning the mutation in the name of the respondent....." P. C. Mogha Revenue Minister, in the case of Subhan Ganai etc. versus Abdulla‡ held : "...Abdulla Wani was found to be in possession of the property and registered deed of will executed by Satar recites that Abdulla Wani was his pisar-parwardah. On this *prima facie* evidence the Tehsildar was entitled to order the entry of the name of Abdulla Wani and there is no ground for interference in his order..."

His Highness' decision dated 6 May 1930:

If the factum of adoption is evidenced by possession it is not necessary that the written deed should have been registered. In the case of Mst. Khautani versus Wahab Lon¶ it was held : ".....Circular number 1 dated the 19th of Asuj, 1953 relied upon

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† Decided on the 21st of Bahadoon, 1995.
‡ Decided on the 19th of Sawan, 1996.
¶ Order of His Highness dated the 6th of May, 1930, on an application for revision of the order of the Revenue Minister dated the 3rd of Asuj, 1979.

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by the Revenue Minister has no application to the facts of this case. It does not require adoptions to be evidenced by any written deed but simply dispenses with registration or sign manual where the factum of adoption is evidenced by possession. In the words of the 'Circular' *possession is equivalent to admission* in such cases and where the factum of adoption is taken as admitted it stands in no need of further proof whether by parol evidence or by written deed. There is, however, abundant evidence on both sides in this case to prove the adoption..."

If execution of a will is admitted, parol evidence must be read with caution:

When the execution of a will is admitted and according to the contents of the will a person is a pisar par-wardah of the deceased owner and subsequently oral evidence is adduced to challenge the factum of his being a pisar parwardah, the court should admit such evidence with a good deal of caution. Per Dalal C. J. and Sawhney J. in the case of Sultan Wani and Khizar Wani versus Mohommad Wani and others.† "It is admitted that on the 22nd of Baisakh, 1985 the deceased Ahad executed a will wherein he described Moh'd Wani as adopted son. This Ahad died five years later in 1990. This document is attested by two of the uncles of Moh'd Wani by the name of Nabir and Rahim. Both these persons further support Moh'd Wani's plea that he was an adopted son of Ahad. As usual five persons have been produced by the plaintiff to show that this adoption never took place. Much reliance cannot be put on this oral evidence of this nature and it has not been explained why Ahad should have falsely recorded in formal deed that Mohommad Wani had been adopted by him. In fact there is evidence to show that even before this time he tried to have his estate mutated in the village record in favour of Moh'd Wani but this was refused as he was alive. Another important point to which specified reference has been made by the learned District Judge in his judgment is that two of the uncles of Mohommad Wani support him which is against their interests because if the adoption is not proved they will get 1/6th each, of the estate. The learned Vakil was asked by one of us to explain this attitude of Nabir and Rahim and his reply was that they wanted Mohommad Wani to get the whole estate so that in the event of his dying without any issue they would get the whole of it. This is far fetched and fanciful because we are told that Mohommad is already blessed with a son etc."

38. Mere execution and registration of a deed without proof of an intention to adopt is not sufficient to prove a valid adoption.

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† Decided on the 10th of Bahadoon, 1993.

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Remarks :— The mere existence of a registered deed is not sufficient to constitute a valid adoption but the adoption must have been made public and the intention to adopt have been made manifest. Regular adoption deed is however not necessary if there is proof of treatment as son. "Where a deed executed and registered by the alleged adoptive father purports to recite the fact of adoption, although no doubt the execution and registration of the deed constituted sufficient publicity of the fact of adoption in order to entitle the person, mentioned in the deed as the adopted son, it is essential for the adopted son to show that after the registration of the deed there *has been continuous subsequent treatment of himself by the adoptive father as the adopted son of the latter.*"†

39. Where a person has been held to be the pisar-parwardah of another person, a court of revision should not go into the question of fact and disturb the concurrent finding of the two subordinate courts.

Authorities :— Habib and others versus Ahmad and others revision against the order of Governor of Kashmir, decided by the Revenue Minister on the 12th of Sawan, 1996.

In the above mentioned case P. C. Mogha, Revenue Minister, held ".....There is a registered deed of will executed by Jamal in which Ahmad Bhat is admitted as his pisar-parwardah. The petitioners who are the agnates of Jamal deny that Ahmad Bhat was the pisar-parwardah of Jamal and also contest that Jamal had no right to make will. The question of Ahmad Bhat being a pisar-parwardah has been decided by two courts in his favour and I am not prepared in revision to go into that question of fact and disturb the concurrent finding of two subordinate courts. Nothing has been shown to me to prove that Jamal was not legally competent to make a will. It was contended that the Land Alienation Act prevented Jamal from making a will, but Regulation number 7 of 1990 which was the law at that time clearly allows permanent alienations of all kinds when the alienor and the alienee are both members of agricultural class as is the case here."

40. The circumstantial evidence should be fully taken into consideration before any Person is declared a pisar-parwardah of another

Authorities :— Ahmad Dar versus Mst. Zoonti. decided by

† A. I. R., 1930 Lahore 1072 ; corresponding to 120 I. C., 51.

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the High Court of Judicature on the 14th of Bahadoon, 1985 ; Rasool versus Khaliq, decided on the 25th of August, 1937.

Kashmir case law discussed :

The fact that after the death of the owner his wife got her name entered into the revenue records goes against the person claiming as pisar-parwardah of the owner at the death of the wife of the owner. Per Sawhney J. and Sayed Hussain J. in the case of Ahmad Dar versus Mst. Zoonti ;† ".....If there had been any truth in the contention that the petitioner was adopted as a son by his step father Gaffar, it is hardly likely that after the latter's death the former's own mother would have agreed to the mutation of the land left by Gaffar being made in her favour as his widow. She would doubtless have insisted, as indeed the petitioner would have done to get his paternal inheritance. This is the finding of the three lower courts and is correct." Also if any private arrangement has been arrived at by a person claiming as pisar-parwardah with the party denying him that right to avoid litigation, it should be safely presumed that the person claiming as pisar-parwardah is not contesting without a safe ground. Per K. N. Knox. esq , Revenue Minister, in the case of Rasool versus Khaliq :‡ ".....At the same time it seems to me clear that Mst. Frechi and Sabir came to an understanding and Sabir was allowed to cultivate about half of the land for which apparently he only paid the revenues. Now it is inconceivable to me that if Sabir had no rights at all, Mst. Frechi would not have voluntarily given half the land for cultivation to one who had already put forward a claim which she denied. *One does not give one's land to one's enemy to cultivate.*"

Direct and circumstantial evidence explained :

'Circumstantial evidence is of a nature indentically the same with direct evidence : the distinction is that by 'direct evidence' is intended evidence which applies directly to the fact which forms the subject of inquiry, the *factum Probandum;* circumstantial evidence is equally direct in its nature, but, as its import, it is direct evidence of a minor fact or facts of such a nature that the mind is led intuitively or by a conscious process of reasoning towards or to the conviction that from it or them some other fact may be inferred."¶

41. In the case of adoptions by Jagirdars and Mustamaridars it was essential that the adoptions must have been made in writing. The deed of adoption must have been registered and approved by sign manual of His Highness the Maharaja Bahadur.

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† Decided on the 14th of Bahadoon, 1985.
‡ Decided on the 25th of August, 1937.
¶ Will's Circumstantial Evidence page 20.

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Authorities :— Notification number S-52 dated the 20th of December 1930 ; Notification number S–58 dated 17th April 1931; Resolution number 36 clause 5 dated the 10th of February 1903 ; Resolution number 27 dated the 11th of April, 1896. The case of Pandit Wasa Kak Dhar number 1054 dated the 18th of August, 1907 ; Resolution number 34 of 1899. The case of Kashi Nath Bhan versus Ram Chand Bhan decided by the High Court of Judicature on the 14th of Jeth, 1973.

Remark 1:— Under notification number S—52 dated the 20th of December 1930 the then existing Jagirs and Muafis were classified under three heads namely :-

(*a*) Every person enjoying a Jagir of Rs. 3000/- per annum and over was called a Jagirdar and the document conferring the Jagir on him was designated as a 'Sanad'.

(*b*) Every person enjoying Jagir below Rs. 3000/- per annum was called a 'Pattadar' and the document conferring the grant was called a 'Patta'.

(*c*) Religious grants irrespective of their value were called 'Muafis', the holder called Muafidar and the document conferring the grant was called 'Irshad',

Para number 5 of notification S–52 dated 20th December 1930 (the notification forms an appendix to this book) relating to the rule of primogeniture and adoptions which applied to all Jagirdars and Muafidars reads as under :

"The principle of Primogeniture shall apply generally to all Jagirs and Muafis including those specially exempted here before.,'

"Provided that where the law of Primogeniture has not been in force so far, existing conditions with regard to present co-sharers in the Jagirdars shall not be disturbed as far as possible and each co-sharer who is recorded as such in the settlement records shall continue as a separate Jagirdar or a Pattadar subject to succession being governed by primogeniture. Such co sharers shall not have the right of adoption in case of failure of male issue, in which case, the cosharer's grant shall revert to the nearest male collateral in his line, and in case of failure of such collaterals to the parent stock.

"Provided that so far as the parent stock is concerned adoption shall not be restricted in the above manner and may be governed by the existing rules, viz. it may be permitted, as at present, with special sanction of His Highness the Maharaja Bahadur.

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Explanation :— In restricting adoption by the co-sharers in the manner set forth above, there is no intention on the part of government to resume existing Jagirs or derive any benefit from such restriction, the main object being the amelioration of the status of the Jagirdars and the prevention of disintegration of Jagirs."

Para number 5 of notification number S—52 of 20th December 1930 referred to above has been further cleared by para number 5 of Revenue department notificated number S—53 dated 17th/18th April 1931 (which forms as an appendix to this book) and therefore this para of the notification is quoted below in extenso :

5. "(i) The law of primoginature and adoption as laid down in paragraph 5 of the Revenue Department Notification No. S—52 dated 20th Dec. 1930 shall apply to personal Muaffis tenable during pleasure of H. H. the Maharaja Bahadur, but shall not apply to

(a) Religious Muafis
(b) Muafis tenable during life; and
(c) Sankalef and Aghair Muafis

(ii) For purposes of the law of the primoginature and adoption as laid down in paragraph 5 of the Revenue Department Notification No. S—52, dated 20th Dec. 1930 :-

(a) The original grantee shall be considered to be the person who was in possession of the Jagir when His Highness the Maharaja Gulab Singh became the Ruler of Jammu or such person to whom a Jagir has been granted subsequently.

(b) All heriditary Jagirs shall devolve upon the eldest legitimate son of the late Jagirdar. In the event of there being no such son the Jagir shall devolve upon the senior member of the senior branch of the family of the original grantee. Among the branches of a family descended from one ancestor, that descended from any elder son of that ancestor shall be senior to that descended from a younger son of that ancestor. In the case of failure of legitimate male issue in the line of the original grantee the Jagir shall lapse to the state.

In cases of dispute as to whether a person is co-sharer in a Jagir or Guzara Khar the settlement record shall be followed.

(d) In cases where a minor and not the eldest line has in the past been recognised as Jagirdar, the eldest line having been given a smaller share in the Jagir or only a Guzara, any dispute as to whether the eldest line may continue to be treated as co-sharer or Guzara Khwar, and the minor treated as parent stock, shall be dealt with in each case on its merits."

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By reference to these relevant extracts from the two notifications it will be clear that adoptions cannot be made by Jagirdar's without the sanction of His Highness.

Remark 2— As a step towards the abolition of a parasitic heirarchy of Jagirdars and Jagirdar's Kardars a resolution was adopted by the Kashmir Government headed by Sheikh Mohmmad Abdulla, whereby all Jagir grants tenable during the pleasure of His Highness the Maharaja Bahadur and held in perpetuity subject to the general conditions of loyality or other expressed conditions were resumed by the government with effect from first of Baisakh 2005. The resolution is reproduced below for a ready reference :

"All Jagir grants tenable during the pleasure of His Highness the Maharaja Bahadur or held in perpetuity subject to the general conditions of loyalty or other expressed condition be resumed with effect from 1st of Baisakh 2005 provided that application of such grantee as may deserve maintenance allowance for want of adequate source of income or for other reasons be entertained if submitted within a period of three months from the date of resumption order and that each such case be investigated and decided on merits."

As a result of this resolution the total amount of Jagirs resumed by the Government amounted to Rs 624915/- and the privileged class of Jagirdars was abolished with effect from 1st Baisakh 2005.

Remark 3— There is no substantial distinction between a Jagirdar and Mustamaridar. The latter are only perpetual grants in cash which are convertable from or into the former at the direction of the sovereign. (Refer pages 304, and 305 of *Majmua Zebita Mal.*

Remark 4— Mukararis were cash grants given to individuals in lieu of Jagirs which they held previous to such grants or for some specific service ordinary or political. By an order of the government reproduced below Mukararis have also been resumed with effect from 1st Baisakh 2005 save as such Mukararis as are held by religious institutions. The resolution of the Government in this behalf reads as under :—

"Mukararis tenable during the pleasure of His Highness, or held in perpetuity or in lieu of some political or specific service or during life time be resumed with effect from 1st Baisakh 2005, save such Mukararis as are held by religious institutions which be continued and paid by the Darmarth Department who may exercise their discretion as to the continuance or otherwise of such

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of them as they deem fit, and those which are held in lieu of the services of "Zekhbani" and "Kistibani" be continued as here before."

The total amount saved by the Kashmir Government by the resumption of these cash grants amounted to Rs. 177921/12/5 per year and the privileged class of *Mustamaridars* abolished with effect from the 1st of Baisakh 2005.

Remark 5—The national Government of Kashmir has succeeded to abolish the dynastic rule of Shree Hari Singh Maharaja of Jammu and Kashmir and in future the head of the State who is designated as "Sadari Reyasat" is to be an elected representative of the people. With the resumption of Jagirs and other grants by the State the question of approval by His Highness the Maharaja Bahadur who has ceased to be the Maharaja of the State and whose position has been taken by the new elected head of the State called the 'Sadari-Reyasat' does not arise.

Dina Nath versus Mohan Lal cited :

Per Mr. Justice Kanwar Sain in the case of Dina Nath versus Mohan Lal :† ".....It was, therefore, for the plaintiff to prove that the adoption amongst Kashmiri Pandits in general and in the Dhar family in particular came under an exception to the rule and did not require His Highness' approval or confirmation. There are indeed a number of instances of adoption amongst Kashmiri Pandits in which no distinct order of approval or confirmation was obtained from His Highness'. But in the instances cited and relied on by the lower court (namely Mst. Kudi versus Zanardan Bayu ; Sudha Bayu versus Krishna Bayu ; Janki Nath versus Shridhar ; Kashi Nath versus Nila Kanth) there was probably no question raised of the approval of His Highness'. In cases where the consent of the heads of the community or elders of the family is proved to have been obtained, the approval of the Sovereign may be dispensed with on the recognised fiction of the Hindu Law that the sovereign is supposed to have delegated his authority to them. But such cannot be the case in adoption amongst *Jagirdars* or holders of *Mustamari grants*, who in a way are directly under the control and supervision of the ruler of the land. That our state laws have not yet dispensed with the necessity and approval and consent of the sovereign in cases of adoptions is evidenced by the fact that all deeds of adoptions require under the existing law not only to be registered but also attested by the sign manual of His Highness the Maharaja Bahadur. The approval and consten t, therefore, of His Highness' the Maharaja Bahadur must be explicit in the case of adoption to a Jagirdar or the like. It may be implied only in other cases where the heads of the community or elders of the family have either consented or acquiesced in

† Decided on the 20th of Katik, 1981.

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the adoption. Such is not the case in Dina Nath's adoption. In the orders of His Highness, the Maharaja Bahadur dated the 28th Chet, 1965, 3rd Katik, 1968 and 14th Bahadoon, 1976, Dina Nath's adoption was not approved by His Highness' the Maharaja Bahadur and the permission conveyed to the plaintiff in His Highness' order dated the 16th of Baisakh, 1977 to have the matter thrashed out in a competent court is not tantamount to the necessary approval. Nor is the plaintiff's adoption accepted or agreed to by any members of the Dhar family....."

"No good and substantial distinction has been made out between Jagirdars and Mustamaridars. The latter are only perpetual grants in cash which are convertable from or into the former at the discretion of the sovereign (vide page 304 and 305 *Majmua Zabita Mal*). In the case of Tilak Chandra Dhar file number 12 of 1949 and according to the council resolution number 16 of the 24th of Dec. 1892, it has been held that the Mustamaridars stand on the same level as Jagirdars."†

42. It is not necessary that the person adopted should be a relation of the adoptive father. Preference is given to the persons of the same caste. The brother's son the daughter's son the uncle's son or the sister's son can be adopted.

Remark :— It is generally observed that in the matters of adoption preference is given to the persons of the same caste. The brother's son, the daughter's son, the ancle's son or the sister's son are usually adopted. But it should be noted that, on its true interpretation, the entery to this effect in the Rivaj-i-am *is not mandatory but is merely indicatory or recommendatory.* The general rule of custom in this behalf is that relation of the adoptive boy with the adoptive father is absolutely immaterial. In Punjab, however, under the Punjab Customary Law, the appointment of a person of a different *'got'* is generally opposed to custom. Refer 1926, 8 Lah. 48.

Question 75 (h)—Is there any rule by which it is required that the person adopted should be related to the person adopting ? If so, what relative may be adopted ? Is any preference required to be shown to particular relatives ? If so enumerate them in order of preference. Is it necessary that the adopted son and his adoptive father should be (1) of the same caste or tribe, (2) of the same Got. Rivaj-i-am :

Answer—

All Tribes Except as Noted Below :— It is not necessary that the person adopted should be a relation to the adoptive father.

† Mohan Lal versus Dina Nath, decided on the 20th of Katik, 1981.

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Preference is given to the persons of the same caste, if available. The brother's son, the daughter's son, the uncle's son or the sister's son can be adopted. The brother's or the uncle's son is preferred. Sister's son comes next. Among the Mussalman gentry it is necessary that the adopted son and the adoptive father should belong to the same tribe or caste. If the son to be adopted is not of the same caste with the adoptive father, preference is given to the relatives of the wife.

Among Hindus preference is generally given to the persons of the same caste and Gotra.

Gujjars of Achhabal. The person adopted should be an agnate. Persons of foreign tribes are not adopted.

Rajputs of Deosar. The adopted son should be of the same tribe. If the near kindred be not on good terms with the adoptive father, he can not adopt from among them. He adopts from among the remoter relatives. If the agnates dissent, they do not consider him to be his adopted son without the sanction of the Durbar.

Gujjars of Handwara and Sopore, Sansis of Badgam, Bomba Rajas, and Srinagar Mussalmans. No custom.

(*N. B.*—Srinagar Mussalmans are not right in saying so.)

Other Pakhali Tribes of Nunar. The person to be adopted should be a relative or an agnate.

Pandits of Srinagar. No restriction exists regarding adoption. No preference is given to any particular relation. Gotra and caste of the person adopted is not much cared for; but the adopted son must be a Kashmiri Brahman."

43. A daughter's or a sisters's son can be freely taken into adoption by the Kashmiri Pandits of the valley. The Dharam Shastra is not followed in adoption here.

Authorities :—P. L. R., J. & K. Section 1979-91 page 85.

Remark 1 :—There is nothing in the customary law of the land which is opposed to the adoption of his daughter's son by a childless proprietor amongst the agricultural communities of the province. On the other hand, as a general rule, such adoptions are not only countenanced but are looked upon with favour and are perfectly in consonance with the feelings and wishes of the people. The tribes which are opposed to such adoptions are very few indeed and, being exceptions, prove the rule.

Extracts from Rivaj-i-am :

The common sign for legality of adoption that mother of the boy to be adopted as a son could be married by the adopter if she would have been unmarried, is totally disregarded by

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the Kashmiri Pandits. A daughter's son or a sister's son can also be adopted. The Dharam Shastara is not followed in adoptions here.† It is not necessary that the person adopted should be a relation of the adoptive father Preference is given to the persons of the same caste, if available. The brother's son, the daughter's son, the uncle's son or the sister's son can be adopted.‡ Amongst Pandits of Srinagar no restriction exists regarding adoption. No preference is given to any particular relation. Gotra and caste of the person adopted is not much cared for ; but the adopted son must be a Kashmiri Brahaman ¶ Refer also question 75 (a) of the Rivaj-i-am with its answers completely incorporated at page 157.

Pt. Hargopal's treatise On adoption referred:

Pandit Hargopal Koul on page 7 of his treatise on the customary adoption among Kashmiri Pandits writes : "The principle of Hindu Law laid down in the metaphor that only such persons can be adopted whose adoptive father could legally marry the natural mother of the adopted son is not followed among Kashmiri Pandits. Therefore, a sister's son or a daughter's son can be freely taken in adoption... . "

Case law cited :

In a case reported as P. L. R., 1979-91 J. & K. section, page 85 Kanwar Sain J. observed :— "..... It may also be noted that amongst the Kashmiri Pandits generally, the adoption of a daughters son and so too a daughter's or a sister's son amongst the Hindu non-agriculturists is generally recognised as proper person to be appointed heir. (Rattigan's Digest Para 37 a) It is not surprising therefore, to find these Sikhs who are emigrant Brahmans from the Punjab to have either brought this custom with them or to have adopted it from the land of their adoption."

Reference about Sikhs :

The force of the doctrine of the strict Hindu law prohibiting the adoption of a daughter's son or a sister's son (the theory being that no one can be adopted whose mother the adopter could not have legally married) has been considerably weakened by custom which generally favours such adoptions ††

Remark 2 :— It is not necessary that the person adopted should be a relation of the adoptive father Nor is there any restriction as to the relation of the adoptive father with the adopted son's natural mother. As such the brother's son, the daughter's son, the uncle's son or the sister's son can be freely adopted.

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‡ Pandit Sant Ram Dogra's Code of Tribal Custom page 10.
‡ Pandit Sant Ram Dogra's Code of Tribal Custom page 86, in answer to question 75 (b).
¶ Pandit Ram Dogra's Customary Law in Kashmir, in answer to question number 75 (h).
†† 1924, 5 Lahore, 134.

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The prevalence of a custom of this kind amongst people so widely separated geographically is an interesting fact to the student of comparative jurisprudence. Indeed, it was held in 1895 by a majority of the judges of the High Court of N. W. P. that even under a right interpretation of the Hindu Law of the Benaras school itself, the adoption of a daughter's son, or of a sister's son, or of a son of the sister of the mother of the adopter, is not invalid.† But on appeal to Her Majesty in Council this decision was reversed, mainly on the ground that for eighty or ninety years there had been a steady current of authority the other way.‡

Punjab custom referred.

Even in the Punjab the adoption of a sister's son or a daughter's son is greatly favoured by the custom. In 62 P. R., 1888 Rattigan J. observed: ".....We think it must be taken that the decisions of this court have laid down the principle, based upon what judicial experience had found to be the general custom of the agriculturists in the Punjab, that appointments of the kind (sister's son) now disputed are to be presumed to be valid and that the onus lies on those who assert the contrary to prove their allegation. We have no hesitation ourselves in subscribing to this general doctrine which we think is in entire accord with the prevailing custom of the agricultural tribes in the province.

But subsequent to this decision, in a Full Bench ruling¶ it has been held that among the agriculturist classes in the Punjab, (unless a special custom to the contrary is proved), the daughter's or sister's son cannot be adopted, and the initial onus is undoubtedly on the party asserting the validity of such adoptions. This view has been followed in all the subsequent decisions in the Punjab.

It may also be of great interest to a student of comparative jurisprudence to note that a childless man amongst Chinese can only make an adoption with the consent of his agnates, and the act is a solemn one made in a family council and must be announced before an assembly of agnates.

44. An only son, an eldest son or a brother can freely be given in adoption.

Exception :—Pandit Sant Ram Dogra in answer to question 75 (f) writes that amongst Pandits, other than Pandits of Srinagar, a man cannot give his only son or eldest son in adoption. Pandits of Charrat make a reservation in favour of

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† I. L. R. XVII All. 294, F. B.
‡ L. R. XXVI Indian app. 153. ¶ 5 P. R. 1893.

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the eldest son being given in adoption if he has younger brothers.

The Privy Council has held that an adoption of the kind referred to in this paragraph is not null and void under Hindu Law.† Although under the strict Hindu Law it is well settled that an orphan cannot be validly adopted;‡ if a custom is proved under which such adoptions do take place, they will be held to be valid.¶

Hargopal Kaul's phamplet refered.

Pandit Hargopal Koul in his treatise on the customary adoptions among Kashmiri Pandits writes :- "An eldest son among Kashmiri Pandits cannot be usually given in adoption. But when once such an adoption has taken place, the adoption is good and valid in the eyes of law. Also an only son can be given in adoption."

The author of this work has not been able to find out any decided case of any court in Kashmir in which an adjudication on a matter referred to in this paragraph may have been discussed. It appears that no such case has appeared for adjudication in a court of law in Kashmir so for.

Doctrine of factum valet.

In many cases where it was necessary to admit that adoption has been made in violation of the rule laid down by ancient authorities, an attempt has been made to support the adoption on the principle of *'factum valet quod fieri non debuit'* what ought not to be done becomes valid when it is done. The limits within which the rule can be applied have been much discussed in several cases in Bombay and Allahabad. In Bombay it has been said of this rule that its proper application must be limited to cases in which there is neither want of authority to give nor to accept nor imperative interdiction in the law of adoption. In cases in which the *Shastra is merely directory and not mandatory*, or only indicates particular persons as more elligible for adoption than others, the maxim may be useful and properly applied if moral preference be disregarded.

In an Allahabad case where all the previous decisions were reviewed by Mohamood J. on the point it was remarked : "In the case of adoption there are of course questions of formalities, ceremonies, preferences in the matter of selection and other points

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† L. R. XXVI Indian appeals 113 ; P C., I. L. R., XXI All 460; I. L. R. XXII Mad. 398.
‡ 1925, 52 Cal. 482 at page 488, P. C.
¶ 1921, 49 Cal. 120 P. C. 26, 100 Ind. cases 778 (Allahbad). P. C. 49 All. 302.

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which amount to moral and religious suggestions. Such matters speaking generally are dealt with in the text in a directory manner relating to what I may perhaps call the *Modus Oparandi* (mode of operation) of adoption. To such matters which *do not effect the essence of adoption*, the doctrine of *factum valet* will be undoubtedly applied upon general ground of justice, equity and good conscience and irrespective of any authority in the Hindu law itself. There may indeed be codes where the express letter of the text renders that which would in other systems be regarded as a matter of form, a matter of imperative mandate or prohibition effecting the very essence of transaction. Adoption in the Hindu law being in the nature of a gift, three main matters constituting its elements, apart from questions of form, *viz.* the capacity to give, the capacity to take and the capacity to be the subject of adoption, seem to me to be matters essential to the validity of the transaction and as such beyond the provision of the doctrine of *factum valet.*"

Similarly in a case where the Judicial Committee had to consider the adoption of an only son, their Lordships said : "No system of law makes the provisions of legal obligation co-extensive with that of religious and moral obligation. A man in his conduct or in the disposition of his property may violate the plainest dictates of his duty and yet he may be within his legal right."

Considerable misconception used to prevail in Indian courts about the applicability of this doctrine to cases governed by Hindu law. But in the case of Sri Balasu Gurulingaswami versus Ram Lakchman,† the Judicial Committee had to consider the subject which has been fully illucidated by their Lordships in the following passage :—

"Their Lordships ought to state their concurrence with the learned C. J. in his remarks on the so called doctrine of *factum valet* that, that unhappily expressed maxim clearly causes trouble to Indian courts. Sir Micheal Westropphe is quite right in pointing out that if the *factum i e.* external act is void in law there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law, but it is non-sensical to apply the whole maxim to the same class of actions, to say that what ought not to be done in morals stands good in morals or what ought not to be done in law stands good in law." These observations of their Lordships if properly understood are expected to prevent, errors in the application of the doctrine to a considerable extent.

† 1899, 22 Mad. 398 at page 408.

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Question 75 (f)—May a man give in adoption— Rivaj-i-am

(1) his only son,
(2) his eldest son,
(3) his brother ?

Answer—

All Tribes Except as Below. A man may give his only son, his eldest son, or his brother in adoption. But the Sunnis of Baramulla make an exception to the above, saying that an only son has never been known to have been given in adoption, whereas the Mussalmans of Sopore say that an eldest son is not also given in adoption.

Bomba Rajas and Gujjars of Sopore. Adoption is not customary

All Pandits Except as Below. A man cannot give his only son or eldest son in adoption. Pandits of Chharat make a reservation in favour of the eldest son being given in adoption, if he has younger brothers.

Rajputs of Deosar. No custom. The custom of giving an only son for adoption is very rare.

Pandits of Srinagar. Adoption of such sons is valid if no objection is raised to it.

45. The appointed heir succeeds to all the rights and interests held or enjoyed by the appointer and *semble* would succeed equally with a natural son subsequently born.

Remarks :— On the appointment of an heir the intention of the appointer is to confer upon the appointed person the status of a natural son. Therefore, if a son is born subsequent to the appointment, the appointed heir enjoys an equal status with the subsequently born son or sons for the purpose of inheritance of the appointer's property.

The adopted son inherits from his adoptive father. If sons be born to the adoptive father subsequently to adoption, all of his sons inherit equally with the adopted son. The adopted son inherits even if he be of an alien tribe or caste.† An exception is mentioned by Mr. Dogra in the same question. It is stated that in the case of Mussalmans of Srinagar only the natural son inherits and the adopted son can do so only in case of a gift and *Tamlik*. Adopted sons do generally inherit the property of their adoptive fathers They can inherit the property of their natural father, if the father or brother consent to it, otherwise not.‡ Rivaj-i-am referred.

† Pandit Sant Ram Dogra's Code of Tribal custom—question No. 75 (k)
‡ Sant Ram Dogra's Code of Tribal Custom page 10.

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Thus after performance of these ceremonies, it is not in the power of the adoptive parents, to return the adopted son to his natural parents. Even if he is returned to his natural parents he gets his adoptive parents heritage and not that of his natural parents †

Question 75 (k)—Describe the rights of an adopted son to inherit from his adoptive father? What is effect of the subesquent birth of natural legitimate sons to the adoptive father? Will the adopted sons take equal shares with them?

If natural legitimate sons be born subsequently to the adoption where the Chundawand system of inheritance prevails, how will the share of the adopted son, if any, be computed? Can an adopted son whose tribe differs from that of the adoptive father inherit from him?

Answer—

ALL TRIBES EXCEPT AS MENTIONED BELOW.

The adopted son inherits from his adoptive father. If sons be born to the adoptive father subsequent to adoption, all of his sons inherit equally with the adopted son. The adopted son inherits even if he be of an alien tribe or caste; but the Rajputs of Deosar, Pandits of Anantnag Town, Sopore, Badgam, and Srinagar, Gujjars of Badgam, Handwara, and Nunar, Sikhs of Handwara and Nunar, and Bakkerwals of Nunar, differ from the above in holding that a person of a stranger tribe cannot be adopted and get a heritage.

Watals of Anantnag and Pattan and Gujjars of Sopore. No custom.

All Mussalman Tribes of Srinagar. Only natural son inherits, the adopted son can do so only in case of gift and Tamlik.

Pandit Hargopal Koul in his treatise on the custom of adoption prevalent among Kashmiri Pandits on page 16, also mentions that the adopted son succeeds to the property of the adoptive father as if be were the natural born son of the adoptive father and if there are sons born subsequent to the adoption he succeeds equally with all of them.

Among Mohommadans an adoption by a widow, not authorised by her deceased husband, and not made with the consent of the husband's kindreds, only confers on the adopted son a right of succession to the widow's own private property which was within her disposing power. But among Kashmiri Pandits a widow being possessed of an obsolute authority to adopt to her husband even without the express authority of her husband and even

† Sant Ram Dogra's Code of Tribal Custom question 75 (k)

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without the consent of her husband's near kindreds, the son adopted by the widow succeeds to all the interests of the deceased husband of his adoptive mother.

46. An appointed heir does not lose his right of succession to the property of his natural father as against collaterals. He succeeds in the presence of his brothers provided his natural brothers and nephews give their consent to his succeeding to his natural father as such.

Explanation :— Amongst Mussalmans of Kulgam, Pattan, Baramulla, Sopore and Badgam ; and zamindars of Kund and all Mussalman tribes of Handwara the adopted son can succeed to the natural father as well, if the latter has no heirs.

Exception :— Amongst all Hindu tribes an adopted son inherits only his adoptive father. But amongst the Sikhs of Handwara, Pattan, Baramulla the son given in adoption can inherit his natural father as well if the latter had no agnates.

Illustration.

A, a Muslim agriculturist living in the valley, dies leaving two sons B and C. C has been taken as a pisar parwardah in another family. C shall succeed to A's property provided B gives his consent to his succession as such. Otherwise not.

Authorities :— Rasul, appellant versus Akbar minor, under the guardianship of Sabir Butt, decided by the Revenue Commissioner on the 22nd of Sawan, 1995 ; Sabir, Sultan etc , sons of Ahad Dar versus Ramzan, decided by the Revenue Minister on the 31st of Bahadoon, 1996.

The rights of an adopted son to inherit his natural father's property have been discussed in the case of Rasul, appellant, versus Akbar minor under the guardianship of Sabir Buth.† In that case the Revenue Commissioner held : "This view of the Tehsildar is erroneous because in accordance with the custom prevailing in the valley a Pisar Parwardah can also inherit the property of his father provided his brothers etc , who are the successors of his father do not object to it. This point has been thoroughly discussed by the Wazir Wazarat." In the case of Sabir, Sultan etc. sons of Ahad Dar of Tehsil Sri Pratap Singh Pora versus Ramzan son of Samad Dar,‡ it has been clearly held by the learned Revenue Minister that if one of the co-sharers is not in posses-

† Revenue Revision number 230 of 1995, decided on the 22nd of Sawan, 1995.

‡ Decided by the Revenue Minister on September 19, 1939, corresponding to Bahadoon 31, 1996.

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sion and the reason to his not being in possession is said to be the fact that he has heen taken as a Pisar Parwardah in another family, his name must be entered in the revenue records. The Revenue Minister held :— "In this petition of revision against the Revenue Commissioner's orders it is contended that the Revenue Commissioner was wrong in rejecting the petition of revision on the ground that no appeal was filed and as Ramzan was Pisar Parwardah of another person in another village he has lost all rights to succeed to any property in his original family. It is not necessary for me to consider whether the Revenue Commissioner was or was not right in throwing away the petition of revision merely on the ground that no appeal was filed because I have heard the petitioner's counsel on the merits of his claim and find that although the Wazir Wazarat may have committed a mistake in ordering the entry of the name of Ramzan, Ramzan had not filed an appeal before him, yet I do not think that the order is on the merits an unreasonable one, so far Ramzan and the petitioners stand in the same degree of relationship with the deceased and are ordinarily equally entitled to succeed. The story which is now put forward in this petition for revision, *viz.*, that Ramzan has been adopted in another family was never put forward before the Tehsildar and there is no allegation on the file to that effect. The only ground which was used by the petitioners before the Tehsildar against Ramzan was that he was not in possession and on this ground alone Tehsildar rejected the claim of Ramzan. This was not a sufficient ground. When one of the several co-sharers is not in possession but is obviously entitled to the property, his name should be entered along with those of the persons in possession and the Wazir Wazarat was, therefore, right on the merits to order the entery of Ramzan's name....."

Rivaj-i-am

Question 75 (j)— Does an adopted son retain his right to inherit from his natural father ?

Can he inherit from his natural father if the natural father die without other sons ?

Answer—

All Mussalman Tribes Except as Below. An adopted son inherits only his adoptive father generally, but he can inherit his natural father also with the consent of his brothers or nephews.

Sunni Mussalmans of Kulgam, Pattan, Baramulla, Sopore, and Badgam, Zamindars of Kund, and all Mussalman tribes of Handwara add that he can succeed to the natural father as well if the latter has no other heirs.

Sunni Mussalmans of Tral, all Mussalman Tribes of Khanabal, Gujjars and Shias of Pattan and Badgam, Townspeople of Sopore,

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Other Pakhli Tribes, and Srinagar Mussalmans. An adopted son can inherit from his natural father with his other sons. If the natural father dies without other sons or grandsons, the whole of the heritage goes to the son given in adoption.

Gujjars and Watals of Achhabal, Gujjars of Sopore and Bomba Rajas. No custom.

All Hindu Tribes Except as Noted Below, Gujjars and Watals of Kulgam, Kund, and Nandimarg. An adopted son inherits only his adoptive father and never his natural father.

Sikhs of Handwara, Pandits of Chharat, Khanabal, Handwara Pattan and Baramulla add that if there be no agnate of the natural father the son given in adoption can inherit his natural father as well."

Rivaj-i-am interpreted :

"Among all the Mussalman tribes in the valley an adopted son inherits only his adoptive father generally, but he can inherit his natural father also with the consent of his brothers or nephews."† These words may well be interpreted to mean that the consent of the brothers or nephews must exist at the time when he would inherit from his natural father. A consent given by the brother's or nephew's at the time of the inheritance but subsequently claiming that their brother cannot inherit for want of their consent cannot effect the right of a Pisar Parwardah to succeed to his natural father. "Adopted sons do generally inherit the property of their adoptive fathers. They can inherit the property of their natural father, if the father or brothers consent to it, otherwise not "‡ It is, therefore, clear that the consent of the father or that of the brother's nephews must exist before a pisar parwardah can claim inheritance in his natural father's family.

There does not exist any direct authority in which the rights of a pisar parwardah to succeed to his natural father who has no other heirs might have been discussed. But the Code of Tribal Custom by Pandit Sant Ram Dogra in answer to question 75 (i) mentions : "Among Mussalmans of Kulgam, Pattan, Baramullu, Sopore, Badgam and zamindars of Kund and all Mussalman tribes of Handwara the adopted son can succeed to the natural father as well, if latter has no heirs....."

"An adopted son shall never take the family name and

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† Pandit Sant Ram Dogra's Code of Tribal Custom page 67, in answer to question number 75 (j)

‡ Sant Ram Dogra's Code of Tribal Custom for the Kashmir valley page 10.

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the estate of his natural father; the funeral cake follows the family (name) and the estate; the funeral offerings of him who gives (his son in adoption) ceases as far as that son is concerned."†

Pandit Hargopal Koul in his treatise on the custom of adoption among Kashmiri Pandits observes on page 19 of the pamphlet:— "...The adopted son loses all his rights of inheritance in his natural father's family. Nor does he retain any right to perform the obsequil ceremonies or the *Kriya Karam* of his natural parents. The members of his natural father's family cannot claim any right of succession to his property. The position is to be regarded as if he were never born in his natural family....."

Amongst Hindus of the valley an adopted son has no right to inherit from his natural father but an adoption does not divest any property which has vested in the adopted son previous to adoption.‡ The same law is observed in the valley as well. But no authorities of the Kashmir courts on the point are available.

Pandit Sant Ram Dogra in his code of Tribal Custom at page 68 in answer to question number 75 (j) mentions as follows: "Among all Hindus of the valley an adopted son inherits only his adoptive father. But amongst the Sikhs of Handawara, Pandits of Chharat, Khannabal, Handwara, Pattan and Baramulla the son given in adoption can inherit his natural father as well if the latter has no agnates... ."

Customary appointment and Kritrima form of adoption.

The customary appointment of an heir among Muslim agriculturists in Kashmir resembles, in many respects, in its incidents, the *Kritrima* form of adoption of Hindu Law and it is clear that the appointed son does not lose his rights of inheritance in his natural family. "A Kritrima adoption does not transfer the subject of it from his natural family. It gives him, in addition to his rights in that family, rights of inheritance to the person actually adopting him, and to none else. His sons acquire no rights of inheritance to his adoptive father." As regards succession, the Kritrima son loses no rights of inheritance in his natural family. He becomes the son of two fathers to this extent that he takes the inheritance of this adoptive father, but not of that father's father or other collateral relations Nor do his sons take any interest in the property of the adoptive father, the relationship between adopter and adoptee being limited

† Mitakshara Venkata Narsings versus Rangapyor, 1906, 29 Mad. 43.
‡ Trevelyan's Hindu Law.

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to the contracting parties themselves and not extending further on either side.

Merely on grounds of certain similarities between the *Kritrima* form of adoption and customary adoptions in this province it is not, however, correct to say that the two forms are identical. The correct view is that the customary appointment of an heir in the Kashmir valley resembles, in many respects in its incidents, the *Kritrima* form of adoption of Hindu Law.

A person appointed an heir under the customary law of the Punjab is not debarred from succeeding collaterally in his natural family in the presence of his natural brothers, although he cannot compete with them in matters of succession to the estate of his natural father. Shadi Lal C. J in a concurring judgement said :— "The appointed heir does not cease to be a member of his natural family and does not lose his right of succession in that family. His appointment as an heir, however, confers upon him the right of succeeding to the estate of his adoptive father ; and it was, therefore, considered unjust that he should be allowed to compete with his natural brothers in the matter of succession to the estate of his natural father. Equity and justice demanded that he should not succeed to the property of his natural father in the presence of his natural brothers."

Referring to the concluding words of Art. 48 of Rattigan's Digest "but does not succeed in the presence of his natural brothers, the learned C. J. said :— "This exception has no application to the case of a succession to the estate of a collateral in the natural family, because it is common ground that the appointed heir has no right of succession to the collateral relatives of the appointer. Neither the nature of the relationship created by the appointment of an heir, nor the rule of equity can be invoked to support the contention that the appointed heir, who does not succeed to the estate of the collateral relatives of the appointer, should be deprived of succession to a collateral in the natural family, merely because he has got his natural brothers in that family."†

Collateral Succession.

47. Among the Muslim agriculturists in the valley an appointed heir does not acquire a right to succeed to the collateral relatives of the person who appoints him in as much as the relationship established between him and the appointer is purely a personal one.

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† Shadi Lal, C. J.; 1900. 11 Lah. page 615.

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Illustrations.

(1) A, a widow belonging to the Muslim agricultural community, adopts B. B is entitled to succeed to the estate of which A was in possession at the time of adoption but has no right of succession to the property of C, A's deceased husband's brother.

(2) 'A' a Muslim agriculturist appoints 'B' as his son. A's brother 'C' dies issueless. B or B's sons cannot claim inheritance to C's property.

Authority :— Ahad versus Samad 7 J. & K. Law Reports 186.

Remarks :— Relationship established between the adoptee and appointer is a purely personal one. The customary appointment of an heir does not involve the transplanting of the heir from one family to another. The tie of kinship with the natural family is not dissolved, and the fiction of blood relationship with the members of the new family has no application to the appointed heir. The relationship established between the appointer and the appointee is purely a personal one and does not extend beyond the contracting parties on either side.†

General rule :

Rights of oppointee in adoptive family and in his own natural family :— The general rule is that an appointed heir does not succeed collaterally in the family of the person who appointed him such heir and the reason for this rule is presumably the other rule, also of almost universal application throughout the province, that a person who has been appointed heir in one family does not lose his right of succession collaterally in the family of his natural father. It may well be, therefore, that in cases where custom does not recognise the latter rule *i. e*, where the appointed heir loses all rights of collateral succession in his own natural family, that custom would (also) recognize his right to collateral succession in the family of the person who appointed him heir.‡

Per Kilam J. in Ahad versus Samad :- ".....in the Punjab the law is settled now that unless a contrary custom is proved, an appointed heir cannot succeed to the collaterals of the appointer. It has been held there that the appointment of an heir creates a personal relation between the parties *i. e* appointer and appointed heir, and it does not go beyond that. (A. I. R. 1922 Lahore 433 F. B). So far as Kashmir is concerned the rights of an adopted son with regard to inheritence are discussed in question 75

† 1923 Ind. Cases 738.
‡ Refer also 40 P. R., 1994 for a similar rule in the Punjab.

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and 75 (k) of Sant Ram Dogra's Tribal custom. In answer to question 75 (k) ; the author of the code states that "the adopted son inherits from the adoptive father." It does not say that an adopted son amongst the Muslims can inherit the property of or succeed to the collaterals of his adoptive father. This makes it abundently clear that such a custom as gives a right to an adopted son to succeed to the Collaterals of his adoptive father is not conceived by the Code of Tribal Custom. But, nonetheless it is open for a person to urge a custom which may not have been recorded in the Code of Tribal Custom. But for that he has to fulfil certain conditions. He must prove that such a custom as is alleged by him is ancient, uniform and unambiguous. The learned council appearing for the appellants made a tiny little attempt at proving the custom by a reference which he sought to draw from the fact that as an adopted son was on an equal footing with a natural born son of a father, so far as succession to the father went, it must be inferred from this that the adopted son can like a natural born son succeed the collaterals of his adoptive father as well. But it is well settled law that custom cannot be established by implications or inferences. It has to be proved as already stated as a fact by evidence which must establish the reasonable, ancient, continuous and definite character of the custom..... " (7, J. & K. Law Reports 185 at 186)

48. A wife cannot adopt a son to her husband during the life time of her husband except with his express consent. Appointment by a woman.

Remarks :— The right to make an adoption primarily vests in the husband. A wife cannot compel her husband to adopt a son. Nor can she without the express consent of her husband adopt a son to him during his life time. The effect of adoption being the conference upon the adopted son the rights of inheritance of the adoptive father's property, a wife who has no proprietory rights in her husband's property during his lifetime cannot transfer any better right to the adopted son than she herself has in the property. As such she cannot confer any secular benefit to the adopted son. Nor is such an adoption sanctioned by law or custom.

Kashmiri Pandit women have power to restrict the choice of their husbands.

The Hindu law of adoption is derived from a few texts one of which relates to the adoption by a woman. Vashishta says :— "Nor let a woman give or accept a son unless with the assent of her lord." Among Kashmiri Pandits in the valley a woman has got a great power to restrict her husband in making the choice of a son. Pandit Hargopal Koul in his treatise on the Law of adoption prevalent among Kashmiri Pandits makes a

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mention of Pandit Prem Narayan Haksar† and Pandit Mahanand Joo Sahib who were obliged to send back their adopted sons to their natural fathers for the reason that their wives did not agree with their husbands in the choice of the son. But this does not mean that a Kashmiri Pandit woman can even adopt a son for her husband at her own choice. There is no such custom and a woman cannot adopt a son to her husband during his life time. Of course, she does possess a great voice in restraining her husband in making the choice of a son.

Rivaj-i-am referred

Among Mohommadans of the valley the customary adoption by a wife during her husband's life time is very rare. A woman cannot adopt if she has her own sons. She can do so if she has not got her own sons. She cannot adopt for herself in the life time of her husband.‡ At page 61, in answer to the same question viz. 75 (e), Pandit Sant Ram Dogra writes : "Among all Pandits with, certain exceptions, a woman can adopt. If the husband be alive, his consent is necessary....."

49. Among Mohommadans a widow can adopt a son to her husband. But the consent of the kindreds or the permission written or verbal of the husband is necessary if the boy to be adopted is of the same family to which the adopter's husband belongs.

Illustration.

A widow of a Muslim agriculturist living in the valley adopts a son for herself and for her deceased husband The adopted boy belongs to a family different from the one to which the widow's deceased husband belongs. The adoption is good even though the consent of the kindreds of the deceased husband is not obtained. But if the boy belongs to the same family to which the deceased husband belonged, the consent of the kindreds must be obtained.

Authorities :— Gaffar adopted son of Mst. Mali of Awantipura versus Ramzan and Ali decided by the Revenue Minister on the 9th of July, 1938 overruling Lassa versus Mohommad Naikoo, an application for revision dated the 12th of September, 1932 before V. N. Mehta esq., Revenue Minister ; Ismail versus Mst. Khatji, decided by the Revenue Commissioner on the 28th of Har, 1995.

Rivaj-i-am :

Question 75 (*e*)—Can a woman adopt ? State whether it is necessary to the validity of an adoption by a widow that she should adopt with the permission, written or verbal, of her deceased husband, or with the consent of his kindred.

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† 1907, P. L. R.

‡ Sant Ram Dogras' Code of Tribal Custom in answer to question number 75 (e), page 63.

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Answer—

All Mussalman tribes except as below. A woman connot adopt if she has her own sons. She can do so if she has not got her own sons. She cannot adopt herself in the lifetime of her husband. A widow cannot adopt without the consent of relatives or without the permission written or verbal of her husband, if the boy to be adopted is of the same family as her deceassed husband's. Sometimes sons have been adopted from stranger tribes ; but this custom was in vogue before the Regular Settlement of 1951.

The Sunnis of Chharat and Kulgam Tehsil add if the heritage belongs to the woman herself, she can adopt and no objection of the brothren of the deceased husband can stand.

Rajas of Yaripura and Uttarmachipura, Watals, Gujjars and Sikhs of Achhabal, Maliks of Shahabad, Watals of Pattan, Gujjars and Sikhs of Handwara, Sopore and Badgam, and Sopore Townspeople. No custom.

Sunni Mussalmans of Achhabal and Handwara, Watals of Handwara and Badgam, Shias of Badgam, Nunar, and Srinagar, and Sunni Mussalmans and Watals of Nunar. A woman can adopt if she is a widow ; but she can not adopt in the lifetime of her husband. There is no necessity of the permission, written or verbal, of a husband for the validity of adoption by his widow, nor is the consent of his kindred essential.

Sunni Mussalmans of Baramulla Tehsil. A woman can adopt if the kindred of a husband consent. There is no necessity of the permission of a husband, written or verbal to validate adoption by a widow.

Gujjars and Shias of Pattan. A widow can adopt a son with the consent of the agnates of her husband. The son adopted must be of the same tribe as widow's deceased husband.

Gujjars, Pakhli Tribes and Bakkerwals of Nunar. A widow can adopt, but the adopted son should be taken from among the agnates of her decased husband.

Sunni Mussalmans of Srinagar. A widow cannot adopt a son, but as regards their Sharai property. they may transfer the property by gift, Tamlik, or will.

All Sikhs Except as Noted Below. No custom of adoption by a widow. She can adopt, if she has got the permission written or verbal of her deceased husband. There is no necessity of the permission of the kindred, but if she has got no special permission of her husband, she can adopt with the consent of relatives.

All Pandits Except as Below. A woman can adopt. If the husband be alive, his consent is necessary. If she becomes a

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widow, she adopts a son at her pleasure from any of the Pandit tribe. Permission of the relatives is not required.

Rajputs of Deosar, and Pandits of Khanabal and Badgam. A widow can adopt, if she has her husband's permission written or oral regarding adoption from among the agnates. If no permission has been given by the husband, consent of the collaterals of her deceased husband is necessary.

Kashmir case law cited :

Per Sir Lal Gopal Mukerjee in the case of Gaffar adopted son of Mst Mali of Awantipura versus Ramzan, and Ali sons of Mst. Khurshi etc.† "The question that arises is whether Mst Mali could adopt and if so, could she make an adoption as to give the adopted son her husband's property.

Mr. Mehata's decision dissented from.

"There can be no doubt that according to the custom prevailing in Kashmir a widow inherits only a life interest in the estate of her deceased husband (see answer to question number 55). The very answer also points out that the widow can transfer her right in favour of her daughter's adopted sons, or Khana Damad, and nobody else. This should indicate that if any transfer is made in favour of an adopted son by a widow the adopted son gets not only the widow's life interest but also a complete interest in the property of the widow's late husband. Further the answer to question 75 (e) shows that with certain local and tribal exceptions (which don't apply here) a woman can adopt if she is childless. The only restriction on her right of adoption is that she has *to obtain the consent of her husband's relatives or the permission of her husband if the boy to be adopted is to be of the same family as her deceased husband* This restriction does not apply here as the boy adopted does not belong to the family of the husband of Mst. Mali. The learned counsel for the respondent has drawn my attention to a decision of Mr. Mehta, a learned predecessor of myself, passed on an application of revision filed by Lassa against Mohommad Naikoo and others.‡ With all respects I am afraid Mr. Mehta entirely misread the answer given by Mr. Dogra to question number 75 (e). Mr. Mehta read the answer as meaning that the boy to be adopted must belong to a family of the deceased husband and the widow must obtain previous consent of her husband or husband's relations. This is not the meaning which can be given to the plain words of the answer. As I have already indicated the consent would be necessary only when the boy to be adopted belongs to the same family such as the adopter's husband. Possibly with Hindu instinct in him, Mr. Mehta thought that a collateral of the husband was to be preferred for adoption to a total stranger to the family.

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† Revenue appeal no. 114 of samvat 1994, decided on July 9, 1938.
‡ Dated 12 September, 1932.

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However, it is sufficient to say that I am not in agreement with Mr. Mehta ....."

In another case Ismail versus Mst. Khatji, decided on the 28th of Har, 1995, Mr. Afzal Khan, Revenue Commissioner observed: "It is laid down in the answer to question 55 in the Code of Tribal Custom in Kashmir by Pandit Sant Ram Dogra that : 'widows inherit only a life interest in the estate of their deceased husband. They can transfer their right only in favour of their daughters, adopted sons or Khana Damads and nobody else'. Even presuming that the appellant was her adopted son since she had a life interest in the estate any transfer made by her beyond her life time is invalid. Again in answer to question 75 (e) it is stated that a widow cannot adopt without the consent of relatives or without the permission written or verbal of her deceased husband, if the boy to be adopted is of the same family as her deceased husband's. There is nothing on the record to show that the appellant is from the family of Rahim. It is urged by the learned counsel for the appellant that she can adopt even an outsider if there is no boy from this family of the deceased. The appellant is *'Ganai'* while Rahim was *'Mir'* by caste. The case has been thoroughly considered by the subordinate Revenue Officers and agreeing with the concurrent finding of the Tehsildar and Wazir Wazarat I dismiss this appeal."

Gist : It is, therefore, a settled point that among the Mohommadans a widow can adopt a son to her deceased husband even without the consent of the near relatives of her husband if the boy adopted belongs to a family different from that of the husband's family. But if the boy belongs to the same family to which the husband of the widow belongs, the consent of the relatives of the deceased husband is essential It appears that the rule of law laid down by Sir L. G. Mukerjee in the case of Mst. Mali versus Ramzan‡ is not based on any recognised principle of equity in as much as the consent of the near relatives of the deceased husband, of the widow adopting a boy has been recognised as imperative in cases in which the boy to be adopted belongs to the family of her deceased husband, but no such consent is required in case the boy to be adopted belongs to a family different from that of her deceased husband.

50 Among Kashmiri Pandits in the valley a widow has got an unrestricted power to adopt a son for herself and for her deceased husband. The consent of her husband or that of her husband's kindreds and collaterals is immaterial.

Explanation :— The custom of a widow's unrestricted

‡ Decided on the 9th of July, 1938.

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power of adoption prevalent among Kashmir Pandits in the valley is recognised amongst the Bohara Community of the valley also.

Illustration.

A, a Kashmiri Pandit widow, adopts a son for herself and her deceased husband in defiance of the wishes of her father-in law. There is no express permission from her husband that she can do so. The adoption is valid and the permission of the husband or that of her father-in-law is immaterial.

Authorities :— A widow's unrestricted right to make an adoption even in defiance of the wishes of her husband's collaterals and close kindreds has been judicially recognised in the following cases :—

(1) Mst. Kudi versus Zanardan, civil file no 2 Adalt Sadar, decided on the 22nd of Magh, 1948 by the District Judge Kashmir.

(2) Kashi Nath Bhan versus Gwash Lal Bhan and others, decided on the 3rd of Magh, 1987 by the High Court of Judicature J. & K. under clause 21 B of the Constitution then in force, reversing the decision of the then learned High Court Judge.

(3) Kashi Nath minor versus Nila Kanth minor, civil appeal no. 68 of 1971, decided on the 20th of Magh, 1971 by the District Judge,

(4) Madhusudhan versus Shrudhar Pandit, civil original file decided on 15th Katik, 1980 by the senior Sub Judge, Srinagar.

(5) Soda Bayu, under the guardianship of Mst. Parvati versus Zana Bayu, decided by the High Court in Asuj, 1963.

(6) Haldar versus Aftab Bhan, decided by the Revenue Minister on 20th Bahadoon, 1963.

(7) Maharaj Narayan versus Bannuji decided on 18th of December, 1906.

(8) Prem Narrain Haksar's case reported as 34, 1907 P. L. R.

(9) Krishna Koul versus Shardanandan, decided by the Board of Judicial advisers, reported as 2 J. & K. Law Reports page 182.

(10) Padam Nath Bayu versus Prithvi Nath, A. I. R. 1957 J. & K. 53.

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Remark 1 :— The strict Hindu law as to the right of a widow to adopt a son for herself and for her husband has been considerably modified by custom among Kashmiri Pandits in the valley. The imperative provisions of the Hindu law contained in the metaphor, 'nor let a woman give or accept a son unless with the assent of her Lord,' is entirely disregarded by the Kashmiri Pandits. Widows right to adopt sons for their husbands is unrestricted and the consent of the collaterals or that of the close kindreds of their deceased husbands is immaterial. It may be noted that while a widow possesses only a life estate in the property she inherits from her husband, she passes on an absolute interest in the same property to the son she adopts for her husband after his death. She as such passes on a better right than she has got in the property herself.

Instances quoted :

A number of instances (of course which have not been judicially recognised) can be quoted where among Kashmiri Pandits a widow has adopted a son to her deceased husband without the authority of her husband and without the consent of his parents or collaterals. For instance the widow of Shiv Bhan adopted a son to her husband without the consent of and against the wishes of her father-in-law Gobind Joo ; widow of Sahib Ram Tikoo adopted a boy without the assent of her father-in-law ; in the family of Raj Koul Magazine a widow adopted a boy without the consent of her father-in-law; the widowed sister of one Pt. Nand Lal Dhar adopted a boy Jaggan Nath against the will of her husband's brothers and collaterals ; Pt. Har Gopal Koul's widowed daughter adopted a boy to her husband in defiance of the wishes of her husband's collaterals ; Mussamat Kudi adopted a boy Shridar Bayu against the will of her husband's collaterals ; one Shankar Joo was adopted by a widow without the assent of her husband's brother, and so on.

No doubt there exist a number of instances (not judicially recognised) in which fathers-in-law have selected boys for their widowed daughters-in-law. For instance Pt. Anand Koul's widowed daughter-in-law adopted a boy selected for her by Anand Koul himself; Pt. Amar Chand Munshi's daughter-in-law first refused to adopt a boy selected by him. Strained relations followed which were smoothed when she afterwards adopted a boy selectd for her by her father-in-law. The widowed daughter-in-law of Pt Bisheshwar Nath Razdan and Ram Chand Razdan adopted the boys selected for them by their respective fathers-in-law, Pt. Tara Chand Trisal's daughter-in-law adopted a boy selected for her by her father-in-law. The widow of Pt. Lachman Joo Dhar forced Jia Lal Dhar upon her widowed daughter-in-law for adoption against her wishes. The widowed daughter-in-law of Pt. Suraj Kak Matoo adopted Pt. Rugh Nath in accordance with the wishes of her

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father-in-law and so on. In all these instances it will be observed that the widows were compelled to accept the boys for adoption selected for them by their fathers-in-law or husband's near kinsmen. At best these instances prove a family custom which exists in one or two families in Kashmir and as such they cannot go to prove any general custom prevalent in the valley in this behalf.

Remark 2 :— A woman among Kashmiri Pandits has got an effective voice even to interfere in the choice made by her husband for making adoptions. Many instances exist in which the husband adopted a son but because the wife did not consent to such adoptions the husband was obliged to send back that son to his natural father. Pt. Har Gopal Koul, in his treatise on the custom of adoption prevalent among Kashmiri Pandits in the valley, makes a mention of Pt. Prem Narayan Haksar (34, 1907, P. L R.) who intended to adopt Ram Narayan, his brother's son, but because his wife Prem Dhanti did not agree to the making of this adoption, Prem Narayan had to send back his adopted son to his natural father. But this does not establish that there exists a custom in the valley in which adoptions are made at the sweet will of the wives and that the husbands have very little hand in selecting boys for themselves. There is no such decided case · But the fact remains that a woman among Kashmiri Pandits has got a great power to restrict her husband in making the choice of a son for himself.

The only case decided so far by the High Court of Judicature J. & K. State in which it has been held that a widow's right to adopt a son for her husband is dependant upon the express authority of her husband or the consent of some if not all of the *sapindas* of her deceased husband is the case of Mohan Lal versus Dina Nath.† In para 37 of this judgment the custom as to the adoption of a son to her husband by a widow is laid down as under :—

"But while I agree with the lower court that no special family custom has been established by the defendant to the effect that the power of selecting and nominating a boy for adoption by a widow rests wholly with the agnates or *spindas* even against the wishes of the widow herself, I do not think it is possible to conclude from this that the widow is by custom free to adopt any boy she pleases either without the concurrence and consent of at least some of the collaterals, agnates or *spindas* of her deceased husband against and in defiance of the wishes of them all. Accordidg to the general Hindu law and usage wherever a widow is permitted to adopt without the express authority of

† Decided on the 20th of Katik, 1981.

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her husband she is enjoined to obtain the consent of some if not all of the *spindas* of her deceased husband This consent is essential and mandatory in case her husband was a member of the joint Hindu family and directory if he was separate † The instances relied on by the plaintiff do not seem to contravene the principles stated above and while the copy of the custom produced by the defendant at page 263 of this file is in support of this even the copy produced by the plaintiff at page 206 does not go against the principle. When, therefore, in this case not only was the consent obtained but the plaintiff's adoption was effected without notice to and in defiance of the combined judgment and declared opinion of all the members of the family of Shankar Joo without exception, the adoption cannot be looked upon as valid under the general Hindu law or *usage*."

According to this decision it is, therefore, obvious that a widow's right to adopt is fettered and for any valid adoption made by a widow the consent of some if not all of her husband's kindreds is essential.

Adoptons by Jagirdars and Mustamaridars and Mohan Lal's case explained.

It may be observed that in cases of adoptions by Jagirdars and Mustamaridars, as mentioned in article 41 of this treatise it is essential that the consent of the sovereign must exist before any adoption is held valid. But in cases where the consent of the head of the community or elders of the family is proved to have been obtained, the approval of the sovereign may be dispensed with on the recognised fiction of the Hindu law that the sovereign is supposed to have delegated his authority to them. In such cases it may be essential that the consent of the head of the family must exist for the purpose of a valid adoption. But even in such cases no laws have yet dispensed with the necessity and approval and consent of the sovereign in cases of adoptions by Jagirdars or the holders of Mustamari grants, deeds of adoption which require under the existing law not only to be registered but also attested by the sign manual of His Highness' the Maharaja Bahadur. The case of Mohan Lal versus Kashi Nath was a case of a holder of a Mustamari grant and naturally the consent of the sovereign was essential for the purposes of a valid adoption. No such consent was obtained in the case and hence adoption was held invalid. The learned judges in that case had no necessity to go into a further discussion and to give any finding on the point of custom as to the widow's right to adopt a son to her husband in the case of Kashmiri Pandits. These observations of the learned judge are, therefore, *obiter dicta* as the custom among Kashmiri Pandits on the point was not directly in issue.

† Gour's Hindu Code section 29 ; Mulla's Hindu Law sections 276, 277.

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Kashi Nath Bhan's case :

This case was followed by the case of Kashi Nath Bhan versus Gwash Lal Bhan and others,† which was also decided by the same judge of the High court, Mr. Justice Kanwar Sain, the then Chief Justice. In that case the learned Chief Justice held as under :—

"The same conclusion may, I think, be arrived at from another point of view too. It is a well settled authority and precedent that among Kashmiri Pandits a widow possesses a customary power of adopting a son for her husband even without any express authority from her husband (vide 34 P. R 1907). Now in this case it is unquestionable that Mst. Umravati took and treated Kashi Nath plaintiff as the adopted son of her deceased husband and almost all the relations viz Rishi Bhan, etc, (excepting only one Ram Chand Bhan) accepted him as such.

"It is well settled an authority and precedent that Kashmiri Pandits are governed by custom and not by the strict rules of Hindu Law, in matters of adoption, and adoption by a widow even without the consent of her deceased husband would be valid amongst them. So even if the plaintiff be deemed to have been taken in adoption by Mst. Umravati alone as the widow of Nath Bhan, the adoption would be valid according to the custom prevailing amongst the Kashmiri Pandits for ordinary purposes. I use 'ordinary purposes' advisedly. For I must make it clear that succession to Jagirs and Mustamari grants in Kashmir is governed not by Hindu law or custom but by special rules which have been laid down by His Highness in Council from time to time (vide Council Resolution No. 36 of the 10th of February, 1903). The trend of judicial decisions on the point of custom as to adoption by widows seems to have been in favour of the *recognition of their absolute authority as far back as the year samvat 1948*, when Mst. Qudi versus Zanardhan Bayu was decided."

Later decision to supersede the earlier:

No doubt Mohan Lal versus Dina Nath,‡ did not recognize the absolute power of widows in the matters of adoptions. But as it was not followed in Kashi Nath Bhan versus Gowash Lal Bhan,¶ it will be correct to say that the *later decision giving quite a contrary ruling will supersede the earlier.*

Other cases referred

In the case of Qudi versus Zanardhan Bayu referred to above, the parties fought on the point whether the power of the widow in the matters of adoption was absolute or restricted. The court after necessary inquiry found in favour of the un-

† Civil 2nd appeal nos. 5 & 6 of 1985 decided on 14th Katik, 1987.
‡ Decided on the 20th of Katik 1980.
¶ Decided in Magh, 1987,

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restricted power of the widow. In Madhusudan versus Shridhar Fotedar the question of the validity of Madhusudhan's adoption by Shrimati Gangamali was in issue. The court found in favour of the plaintiff's adoption by the widow without the consent of her collaterals to be valid by custom.

In the case of Shardanandan Koul versus Krishna Koul† the Hon'ble Judges of the High Court, initialy in an utter disregard of a mass of decisions in favour of the absolute right of a widow to make adoptions, held‡ that the widow was bound to seek the consent of some if not all the *sapindas* of her husband for any valid adoption made by her for her husband. The learned Judges in the decision observed :

"It has been urged by the learned counsel for the plaintiff (appellant) that Mst. Sonabatni was competent to adopt the plaintiff as a son to her deceased husband and that the consent of the defendant No. I to this adoption was not necessary. We, however, see no force in this contention. There is absolutely nothing on record to show that the plaintiff was adopted with the consent of Krishna Koul defendant. It appears that Triloki Nath who was a member of a joint Hindu family, died while he was still a boy of about 15 years of age. It is true that some witnesses have stated that a Kashmiri Pandit widow has an unrestricted right to adopt a son equally to her deceased husband. But the witnesses produced by the defendant, who are equally respectable persons state that a widow cannot adopt without the consent of his kindreds. It is, therefore, clear that the plaintiff has failed to prove that among the Kashmiri Pandits a custom exists whereby the widow of a Hindu co-parcener in an undivided family, can adopt without the consent at least of the father-in-law to whom the law points as the natural guardian and *"venerable protector"* of the widow. The consent of father-in-law is necessary for a valid adoption by a widow, as otherwise it would be unjust to allow a widow to defend the interests of the co-parceners against their will.

"According to the general Hindu law and usage, wherever a widow is permitted to adopt without the express authority of her husband, she in case her husband was a member of joint Hindu family, is enjoined to obtain the consent of some, if not all of the *sapindas* of her deceased husband. In the present case the consent of the *sapindas* does not appear at all to have been

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† Civil 2nd appeal of 1993, decided by a full bench of the High Court on the 14th of Asuj, 1999.

‡ The previous decision of the High Court in the same case dated the 11th of Sawan, 1994.

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obtained and the alleged adoption cannot under the circumstances be looked upon as valid. The Court below was, therefore, right in dismissing the plaintiff's suit. There is no substance in this second appeal which is dismissed with costs."

This decision of their Lordships of the High Court caused a considerable stir and widespread feelings of alarm in the Kashmiri Pandit community in the valley and the Kashmiri Pandits regarded that the immemorial custom of a widow's unfettered right to make adoption was altogether interferred with. In consequence an appeal was preferred by the aggrieved party to His Highness the Maharaja Bahadur on the ground that the decision of the Hon'ble High Court would set up a precedent in the valley against the custom that is being followed by the Kashmiri Pandits from times immemorial. The appeal was accepted and the case remanded to the District Judge through Hon'ble the High Court of Judicature. The parties were allowed to adduce evidence on the point of the custom and a decision in accordance with law was given by the learned District Judge. The learned District Judge taking into full consideration the instances referred to by the parties, the legal decisions in support of those instances, the Rivaj-i-am as laid by Pt. Sant Ram Dogra in his Code of Tribal Custom in the Kashmir valley and Pt. Har Gopal's treatise on the law of adoption prevalent among Kashmiri Pandits in the valley, found in favour of the absolute right of a widow to adopt a son to her deceased husband even in defiance of the wishes of her father-in-law.

An appeal was preferred by the aggrieved party against this decision of the learned District Judge which was decided by a full bench of the High Court consisting of Ganga Nath C. J., Wazir J. and Massud J. (1 J. & K, Law Reports page 456; 1999 Chet part.) The judgment of the full bench is given below in extenso :—

"The question for decision before this Bench is as follows :—

Whether a widow can make a valid adoption without the consent of her father-in-law.

"The plaintiff brought a suit for declaration that he was the adopted son of Triloki Nath. The defendant appellant, *inter alia*, contended that the adoption of the plaintiff was invalid as the widow had not taken permission from her father-in-law.

"The evidence in this case is very meagre, but the question has to be decided on such evidence as has been produced by the parties and is before the court. The plaintiff has produced only two witnesses on this point— Mr. Amar Nath Kak and Mr. Zanardan Teng. Mr. Amar Nath Kak is a leading advocate of this court. He is a

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member and has been Secretary and President of the Sanatan Dharam Sabha. He has stated clearly that a widow can adopt without her father-in-law's consent or permission. He has given one instance of his mother's family. There a widow adopted a boy without the consent of her father-in-law and the adopted son succeeded to the property of his adoptive father. He has given three other instances but they are not directly on the point.

"The second witness is Pt. Zanardhan Teng. His evidence is not of much value because he has given no instance. He has only stated that a widow can adopt without the consent of her father-in-law.

"As against this the defendant appellant has produced four witnesses, P. Anand Koul, P. Amar Chand Munshi, P. Besheshar Nath Razdan and Rai Sahib Sham Sunder Lal Dar. The first three witnesses have given instances of adoption of boys who were selected by the widow's fathers-in-law. P. Anand Koul and P. Basheshar Nath have stated that a widow cannot make an adoption during the life time of her father-in-law. P. Besheshar Nath has set up a new custom of his own. He has stated that other persons can make an adoption for the widows. He has given certain instances where the widows were made to accept the adoptions made by other persons as their own. In the instances given by the first three witnesses, the widows were made to accept the boys adopted by other persons as their adopted sons or to adopt persons selected by their fathers-in-law willingly or unwillingly. P. Amar Chand Munshi turned out his daughter-in-law and when she agreed to adopt the boy selected by him she was allowed to come and live with him. P. Amar Chand Munshi has admitted that the custom about which he has stated relates to first class high class families. He has admitted that he does not know what is the custom which prevails in the families other than those which are called as first class high class families.

"P. Besheshar Nath started by saying that a widow could not make an adoption without the permision or consent of her father-in-law and ended by saying that a widow could not adopt during the life time of her father-in-law.

"These conflicting statements made by the witnesses show that either the witnesses do not know the real custom which prevails among the Kashmiri Pandits or they are not telling the truth.

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"The appellants have relied on a judgment of 20th Katik 1981, where it was held that consent of the agnates was necessary for adoption by a widow. The learned judge who decided this case held contrary view in another case which was decided on 3rd Magh 1987, by a Division Bench of which he was also a member. The decision, therefore, of 20th Katik 1981, which was held by a single Judge has no force.

"The plaintiff has relied on 5 decisions but they relate to the question of consent of collaterals. In those cases it was held that a widow could make an adoption without the consent of the collaterals.

"The evidence of Rai Bahadur Sham Sunder Lal, a witness for the defendant appellant, is very important. He is a very influential man and an *Illaqadar* and belongs to a very respectable family of this place. His evidence leaves no room for doubt that a widow can make an adoption without the consent or permission of her father-in-law. He has clearly stated that she can do so. His statement explains the evidence of other witnesses as to why boys selected by the fathers-in-law were adopted by the widows. He has stated that in respectable families, ladies do not do anything without consulting the male members of their family, but if they wish to act otherwise there is nothing to prevent them. If a widow adopted a boy selected by her father-in-law it was not enough to prove that she had no right to make an adoption without her father-in-law's consent or permission.

"In the year 1972—73 a record of custom prevailing in Kashmir was prepared by Mr. Sant Ram Dogra in the form of questions and answers. The question was can a woman adopt. State whether it is necessary to the validity of an adoption by a widow that she should adopt with the consent of her kindred. The answer was :— 'A woman can adopt. If the husband be alive, his consent is necessary If she becomes a widow, she adopts a son at her pleasure from any of the Pandit tribe. Permission of the relatives is not required. This custom is fully supported by the plaintiff's witness Mr. Amar Nath Kak and defendant's witness Rai Bahadur Sham Sunder Lal Dar. We agree, therefore, with the finding of the learned District Judge that a widow can adopt without the consent or permission of her father-in-law."

A futher appeal was preferred by the agrieved party before His Highness' Board of Judicial Advisors (Refer II J. and K. Law Reports page 182) and their Lordships upheld the view that was taken by the High Court that a widow's right of adoption among Kashmiri Pandits is unfettered and that the consent of the widow's, kindreds or collaterals and even that of the father-in-law of the widow is immaterial for the validity of such adoptions. Their lordships

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in the course of the judgement said : (II J. and K. Law reports at pages 191 to 196.

".....The Board cannot fail to notice that the Full Bench of the High Court felt greatly oppressed by the fact that on the question placed before the Bench, the evidence was very meagre. As already pointed out, in the earlier stages of the case when evidence was being taken, the issue on custom was never framed with direct reference to father-in-law. It was so framed as to explore the custom, if any, that existed about obtaining the consent of the husbands *Sapindas*, collaterals or kindreds. Had the issue been framed in the manner in which the question for reference to the Full Bench was subsequently formulated the result would have been different. In that case the parties would have addressed themselves to proving or disproving the custom of obtaining the father-in-law's consent to validate adoption by the daughter-in-law. The evidence thus elicited would have been of assistance to the court in adjudicating on the real point in issue between the parties. The evidence, elicited as it stands, having been given with reference to the consent of sapindas or collaterals, it has to be seen whether the custom proved or disproved can be deemed by reference to be equally applicable to father-in-law. Before the Board the appellant has argued that the term "collateral" "*Sapinda*", or kindred" include the father-in-law, that what is true of the former must be true of the latter and that, therefore, whatever evidence there may be on the record regarding the consent of collaterals or sapindas being unnecessary, or otherwise, applies with equal force to the father-in-law. A custom may have its own implications and it is not possible to lay down an inflexible rule that no inference is deducible in regard to those necessary implications. But it is doubtful if it is permissible to deduce, as the Board are now invited to do, one from another by a process of reasoning. Each alleged custom and each alleged incident thereof must be proved strictly for, it is well known, there is no sanction for custom but custom itself.

The main argument of the appelant was, first, that the oral evidence, including the instances cited by the plaintiff's witnesses in support of the custom is adequate for establishing that the consent of the father-in-law is needed to validate adoption by the daughter-in-law ; secondly that the Code of Tribal Custom by Sant Ram which authoritative compilation of the customs in vogue in this State is not against the case of the defendant and is in support of such evidence, thirdly, that Judicial decissions cited are in support of the custom making the father-in-laws' consent essential. There are two witnesses cited by the plaintiff namely, Pandit Amar Nath, Kak, Advocate, President of the Sanatan Dharam Sabha, Srinagar, and Janardan Teng, Vakil, both of un-

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impeachable respectability. On the side of the defendant there were four witnesses called Pandit Anand Kaul, President Kashmir Municipality, Pandit Amar Chand Munshi, retired Tehsildar, Pandit Bisheshwar Nath Razdan and Rai Bahadur Pandit Sham Sundar Lal Dhar one of the premier *Raises* and *Illaqadars*. The last named witness, however, stated that, by custom, a Kashmiri Pandit widow is free to adopt a boy without the assent of her father-in-law or of the collaterals of her deceased husband, thus entirely supporting the case of the plaintiff. The other three witnesses, again did not speak to a general custom but to a special family custom limited to certain high class families only, while admitting that the parties to this litigation belonged to a middle class family and not to the said high class families. Thus the testimoney of the witnesses called in support of the defendant's case was not of much assistance to him or to the court.

The main witness for the plaintiff Amar Nath Kak gave several instances of adoption within his knowledge and experience and also referred to certain judicial decissions. The oldest of them is the case of Must. Qudi versus Janardan Bayu, civil file No. 2, Adalat Saddar, a decission of the Chief Judge of Kashmir Babu Rishi Ban Muker Ji, dated the 22nd Magh 1948. It appears from the judgement in that case that the court afforded an opportunity to notables of the Pandit community and *Raises* of the land to testify to the existence of such custom relating to adoption as was in vogue in that community. 'In this connection,' says the judgement, 'I afforded an opportunity to the parties to adduce evidence. On the plaintiff's side notables from the *Pandit Community*, Raises of the land have given evidence in *Adalat Sadar* in a civil suit No. 64 of 1946, such as Pandit Krishen Bhan, Pt. Bishember Nath, Pt. Menak Joo Tiku, Pt. Wassa Kak Dhar, Pt. Resha Kak Tiku etc. Now also a mass of evidence has been produced by the plaintiff bearing on the custom. From that evidence it has been satisfactorily established that according to an ancient custom of this country, the point of origin whereof is not found and which is still continuing, a widow can, without the consent of her husband and Kinsmen, adopt a son for herself and that such adoption, according to the ancient custom which is in vogue in this country is valid. In the evidence instances on the point have been clearly mentioned. For instance, it is stated that Pt. Shankar Joo Dhar son of the late Gobind Joo Dhar, and the grandson of Bakshi Deva Ram and others all have been adopted in this manner. It is also recorded in this evidence that Pandit Saheb Ram Sahib Dharam Shastri, a prominent man of this State adopted Pandit Damoder Shastri in this manner for his mother-in law, and so on. Now it is to be observed that the question is whether the consent of the father-in-law was essential to the validity of adoption in the case of Mst. Qudi. Nor is it

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possible to gather from the judgement whether in the several instances cited in the above extract from the judgement there was any question as to the father-in-law's consent being essential to validate adoption or not. The other unreported decisions cited by the witness for the plantiff, Amar Nath Kak were the following :—

Decision dated 17th Magh 1976 in Civil Appeal 68 of 1971, Kashi Nath, minor, versus Nilakanth minor; decision in Madhusudan minor versus Shri Dhar Fotedar, dated 15th Katik 1980, decision in Kashi Nath Bhan versus Gwash Lal, dated 3rd Magh 1987. Admittedly with the exception of one, they are all cases in which the question was as between the widow, on the one hand and the husband's collaterals, on the other, and they all tend to establish that in the Pandit community the Hindu Law is modified by custom to this extent that, in order to adopt, the widow need not prove authority from her husband, nor need she, in the absence of such authority, obtain the consent of the husband's *sapindas, collaterals* or *kinsmen.*

The plaintiff also relied on the Code of Tribal Custom compiled by Pandit Sant Ram Dogra. Three relevant passages were relied on, first one on page 61 which runs thus : -

'In adoption, the *Kashmri Pandits* do not follow the Dharm Shastra, but the customary law. A widow is so far empowered in adoption that the collaterals or the brothers of her deceased husband cannot interfere in it. The husband cannot adopt a son without the consent of his wife.

A son adopted by a widow long after the death of her husband can inherit his property though it may have been held jointly by the family and acquires the rights of the adoptive mother'.

It is to be observed that the word "mother" seems to be a misprint for "father", otherwise the passage becomes unmeaning. The word 'inherit' seems also to have been used loosely. Secondly a passage on page 63 :—

Question 75 (e)—Can a woman adopt ? State whether it is necessary to the validity of an adoption by a widow that she should adopt with the permission, written or verbal, of her deceased husband or with consent of his kindreds ?

The answer to the above question is to be found on page 64 :—

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"A woman can adopt. If the husband be alive his consent is necessary. If she becomes a widow she adopts a son at her pleasure from any of the Pandit tribe. Permission of the relatives is not required.

The defendant on the other hand contended that the Code of Tribal Custom by Sant Ram Dogra is a book of no authority whatsoever. He concedes that it is admissible in evidence, but questions the weight to be attached to the statements contained. Moreover, he contends that it throws no light on the exact question raised in the present case. Our attention has been drawn to a volume of judicial circulars from which it appears that the Code of Tribal Custom was compiled by Pandit Sant Ram Dogra, Assistant Settlement Officer, under the auspicies of the Government of Kashmir. The order referred to appears under date, 12th Maghar, 1972, as follows :-

"Under His Highness's command (vide Chief Ministers letter No. 1876. dated August 12, 1951, Pandit Sant Ram Dogra, Assistant Settlement Officer, Kashmir, has been appointed special officer to copile Rivaj-i-am (general custom) in Kashmir and it was complained the zamindars do not respond to the summons issued by him. Therefore, as recommended by the department, His Highness (vide Chief Minister's letter No. 4707. dated October 28, 1915) has sanctioned that the said special officer shall be competant to fine upto the sum of Rs 10 any person who does not respond to the summons issued by him."

It can hardly be said, therefore, that it is a book of no authority whatsover. It is quite a different matter as to what weight should be attached to the contents of the volume. At any rate, it is clear from the extracts given above that they do not support the contention of the defendant that where the father-in-law is alive his consent is essential to the validity of adoption by the daughter in-law. It is greatly to be desired in a matter of importance such as this, that the exact extent to which the Hindu Law has been modified or abrogated by custom in Kashmir should be ascertained and recognised by the Courts of law. Perhaps occasion will arise in future for the courts to go more fully into the matter and to come to a satisfactory conclusion on proper and sufficient materials. In this case, however, the situation is different and it obviates the necessity for further investigation. As indicated above ; it is common ground between the parties that the general rule of Hindu law that the husband's authority is necessary for enabling the widow to adopt is not in force in the Pandit community in Kashmir ; and that custom has given the widow a free hand to adopt without such authority. The defendant, however, contended that where as in the present case, the father-in-law is

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living custom has made it obligatory for the widow to obtain his consent, otherwise the adoption made by her would not be valid. It was upto the defendant appellant to substantiate this contention, which he has failed to do. In the circumstances it follows that the High Court was right in upholding the judgement of the courts below decreeing the plaintiff's suit. The Board, therefore, are of opinion that this appeal should be dismissed with costs and they humbly advise His Highness accordingly.

Per Kilam J. in Padam Nath Bayu versus Prithvi Nath (A. I. R. 1957 J. & K. 53).

"It is fully established that a Bohra widow has got a right to adopt a son to herself and her husband even without her husband's permission, though in the present case there is evidence that Shobawati had secured the permission of her husband by making adoption.

Rivaj-i-am referred:

Question no. 75 of Pt. Sant Ram Dogra's Tribal Custom at page 60 reads as under: State the custom relating to adoption. Answer (4). In adoption the Kashmiri Pandits do not follow the Dharma Shastra, but the customary law. A widow is so far empowered in adoption that the collaterals or the brothers of her deceased husband cannot interfere in it. The husband cannot adopt a son without the consent of his wife. Question number 75 (e) on page 63 of the said book reads as under :—Can a woman adopt? State whether it is necessary to the validity of an adoption of a widow that she could adopt with the permission, written or verbal, of her deceased husband, or with the consent of her kindred. The answer to this question reads as under :— "All Pandits axcept as below :— A woman can adopt, if the husband is alive, his consent is necessary. If she becomes a widow, she can adopt a son at her pleasure from any of the Pandit tribe. *Permission of the relatives is not required.*" Pandit Hargopal Koul in his treatise on the law of adoption among Kashmiri Pandits on pages 13 and 14 writes as follows :—

pt. Hargopal's pamphlet referred:

"A widow in Kashmir is not required to obtain the permission of her husband or the consent of her husband's collaterals. A widow has unrestricted power to adopt a son for herself and her husband, and that this custom has been in existence from times immemorial.. No husband, whose wife is living can adopt a boy without his wife's consent.

Conclusion:

The only conclusion that can be arrived at from the aforesaid discussion is that the custom of a widow's unrestricted right to adopt a son for herself and for her deceased husband is prevalent among Kashmiri Pandits from times immemorial and that the consent of her deceased husband's collaterals and near kindreds like the father-in-law or the like is immaterial.

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Effect of adoption by a widow.

51. Among Muslim agriculturists in the valley the effect of an appointment by a widow is ordinarily to divest the estate in the hands of the widow and the title of the person validly appointed by a widow ordinarily relates back to the date of the appointment and not to the date of the death of the deceased husband

But a deceased husband may qualify the power of appointment with a condition that the son appointed by his widow shall not succeed untill after her death and the heir appointed under the power will be bound by such condition

Appointed heir may waive his right of immediate succession in favour of the widow who appoints him.

Remark :— Under the Hindu Law a son cannot object to an alienation validly made by his father before he was *born or begotten*. But as under that law, as under other systems of law, a son conceived is equal to a son born, an alienation is liable to be set aside to the extent of the son's share, by a son who was in his mother's womb at the time of the alienation.† But in the case of an adoption by a Hindu widow, in as much as, an adopted son is in the same position as a posthumous son, and his inheritance dates from the death of the adopted father, the Privy Council has held that the rights of an adopted son are not prejudiced by any unauthorised alienation by the widow which precedes the adoption which she makes.‡

Widow's option to adopt.

52. A widow cannot be compelled to exercise her power of appointment, nor does she forfeit her life-interest by not exercising it.

The widow may exercise the power of making an adoption at any time.

Remark :— Where a Hindu gave a power of adoption to his wife, directing that so long as the wife should live she should remain in possesson of all his property, moveable and immoveable, it was held that the widow took only a life interest in her deceased husband's property with remainder to the adopted son ¶ Refer in this connection I. L. R VII Cal. 288, and Mayne's Hindu Law, 6th edition, page 119.

Formalities.

53. No special formalities are required for making adoptions amongst the Mussalmans and Sikhs of the valley if such

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† I. L. R. XVI Mad 76.
‡ No. 20 P. R. 1887 ; I. L. R. XI Bom. 609
¶ I. L. R. VIII Cal. 357.

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adoptions have been made in writing provided it is coupled with subsequent treament as such. But if the adoptions have not been made in writing an adoption can be proved only by showing that the adopting father went to the house of the natural father with some clothes for the boy and his mother and begged for a son in the presence of relations.

Remark :— Regarding the making of adoptions amongst the Mussalmans of the valley, the usual custom is that adoptions are not made in writing. Regarding the inheritance of the boy to the adoptive father's property, a contract is made by the adoptive father with the natural one of the boy. In certain cases as in the case of the *Sunnis* of Nunar, as is mentioned by Mr. Dogra in his Code of Tribal Custom, the performance of two rites is essential for a valid adoption. First that there should be an announcement regarding inheritance of the heritage of the adoptive father in presence of God and his Prophet and secondly the drawing up of a deed of adoption (though only unstamped paper is generally used by the *Mulla* of the village).

In case an adoption has been made in writing, the non-performance of any of the rites does not vitiate the adoption. The performance of such rites have only an evidentiary value.

Question 75 (i)—Are any formalities necessary to constitute a valid adoption ? If so, describe them. State expressly whether the omission of any customary ceremonies will vitiate the adoption. Rivaj-i-am :

Answer—

All Mussalman Tribes Except as Noted below. To go to the natural father, carrying some clothes for the boy and his mother, with some relations to beg him to give his son to the supplicant is the common custom. Regarding inheritance of the boy to the adoptive father's property, a contract is made by the adoptive father with the natural one of the boy.

Non-performance of these rites does not vitiate the adoption but requires that the contract regarding adoption must be made in writing.

All Mussalman Tribes of Achhabal, and Townspeople of Baramula. Adoption used to be oral in the past times, but now it is made in writing (though not very formal deeds are drawn up).

Watals and Shup-Watals of Kulgam Tehsil. Make an exception to the above in taking clothes to the adoptive father's home. Only the lap is said to be spread in significance of begging for giving the boy in adoption.

Gujjars of *Pattan and Sunni Mussalmans of Sopore.* No rites essential for the validation of adoption exist.

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Gujjars of Sopore, and Sansis of Badgam. No custom of adoption.

All Mussalman Tribes Except Shias of Nunar. Performance of two rites is essential for a valid adoption :—

(1) Announcement regarding inheritance of the heritage of the adoptive father in presence of God and his Prophet.

(2) Drawing up a deed of adoption, though only unstamped paper is generally used (by the Mulla of the village).

Fixing of the share of the adopted son is necessary. No other formality is observed.

Srinagar Mussalmans. The question does not concern them.

All Sikhs. Adoptions are made just as among the Mussalmans. Some Sikhs are called to the home of the natural father of the boy, and an informal deed is drawn up. This is the essentially requisite ceremony. The Ardasa ceremony is not so customary.

The Sikhs of Baramulla, however, add that *Krah-Prasad* is distributed before the Granth Sahib.

All Pandits except as mentioned Below. On some auspicious day settled before hand for the ceremony the adoptive father goes to the house of the boy whom he wants to adopt a son. He takes with him garments for the boy and his mother. There he begs the father to give away the son in adoption. Thus a gift of the boy is made by the parents and in their default by the brother or the uncle of the boy. Tonsure and Yagyopavit ceremonies are subsequently performed by the adoptive father. If the adopted son be already invested with the sacred thread, he cannot be adopted as son, unless the adopted son be of the same family with the adoptive father.

Pandits of Charat. Performance of tonsure and investiture with the sacred thread is not essential for adoption. If the adoptive father die earlier than their performance, a mother can arrange for it through the priest of the family. If accidentally both the parents die away, without observing the above rites, adoption is not considered invalid, as the priest of the family does them.

Pandits of Srinagar. Formalities necessary to constitute a valid adoption are :—

(1) To give and take a boy in adoption.
(2) To nominate or make one to nominate a son for adoption.

Before performance of the Kriyakarm ceremony of the adoptive parents, performance of the rites for adoption as described in the Question 75 (a) is essential."

In the Punjab also in a case relating to Mohommadans of

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Tehsil Dasuya, Hoshiarpur District, adoptee was brought up from infancy by adopter and married by him. A deed was executed in 1872, stating that the adopter regarded him as a son and desired him to succeed. In 1873 mutation was effected but possession was not given. There was no evidence of revocation. Adoption was held proved.†

54. Amongst all Hindus of the valley no adoption is complete without the physical act of giving and receiving the adoptee accompanied by appropriate declaration by the parties about delivering and receiving the boy with intention to transfer the boy from one family to another.

Explanation I :— The execution of a deed of adoption is not in itself sufficient to prove the validity of an adoption and an adoption may be held to be invalid even in the existence of a valid deed of adoption if it is proved that the act of giving and taking did not take place.

Explanation II :— If a deed of adoption is proved to exist and the validity of adoption is impeached on the ground that the act of giving and taking did not take place, it is for the person impeaching the validity of the adoption to prove that the adoption did not take place in accordance with the contents of the adoption deed.‡

Giving and taking.

Remark :— The physical act of giving and receiving is absolutely necessary to the validity of an adoption This is not only in the case of the twice born classes but also in the case of Shudars.¶ It is of the essence of adoption and the law does not accept any substitute for it. Mere expression of consent, or the execution of a deed of adoption, though registered but not accompanied by an actual delivery of the boy, does not operate as a valid adoption.††

Adoption made during pollution.

An adoption made during pollution or impurity on account of the birth or death of a relation in the family is not invalid because the secular formality of receiving the boy may be performed by the adopter, but the religious part of the ceremoney may be delegated to some other relation who is free from impurities (*Honch*). Even the physical act of giving the son in adoption may be delegated to another person,‡‡ but the right and power to give in adoption cannot be delegated by the father or

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† 70 P. R., 1878. ‡ 1926, 8 Lahore L. J. 291.
¶ 128 I C. 532; 1892 19 Cal. 452.
†† 1881, 6 Cal. 288, 1873 11 Cal. I. R. 171.
‡‡ 1901, 25 Bom. 551.

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the mother to any one, as the exercise of such power requires discretion.

Extracts from the Rivaj-i-am.

Among the Pandits there is another kind of adoption in which the ceremony of giving and taking does not occur at all. Only nomination of a boy as an adopted son is made i.e., a person nominates his own son or the son of a relative as an adopted son of a man, who is dead or is absent from home.†

Giving and taking in cases where the adoptee belongs to the adopter's family

In certain cases when the boy to be adopted belongs to the same family to which the adopter belongs, it is not necessary that the physical act of giving and taking should take place. In such cases the custom among the Kashmiri Pandits is that the adoptive father makes a declaration that he shall treat a particular boy as his own son. For instance, when one brother intends to adopt his another brother's son, what is usually done is that the adopting father makes a declaration that he shall treat his brother's son as his own son. But it has been observed that in many cases when there would arise any differences between the adoptive father and the natural father of the boy, the adoptive father would refuse to treat his adoptive son as such any longer and would adopt another boy from some different family. It becomes quite difficult for the boy or his natural parents to prove in a court of law that he was adopted by the other, specially when no physical act of giving and taking had taken place and when there did not exist any formal deed of adoption in his favour.

Hargopal's treatise referred

Pandit Hargopal Koul in his treatise on the custom of adoption among Kashmiri Pandits on page 16 writes as under: "No special formalities are essential for the purposes of making a valid adoption among Kashmiri Pandits except the ceremony of giving and taking. In such cases, as in the case of *Kanaya Dan* the adoptive father begs for a son from the natural father of the boy who gives his son to the adoptive father. In case the boy to be adopted belongs to a different family, the adoptive father goes to the house of the natural father of the boy to be adopted along with some relatives and friends and begs for a son in the presence of relatives and friends of the natural father. The natural father then gives the boy to the adoptive father who presents the boy with some new garments. After this the natural mother ceases to have all connections with her boy. Where the boy to be adopted belongs to the same family, the performance of offering the boy to the adoptive father does not take place but only a declaration is made by the adoptive father that he shall treat the boy as his son in future."

† Pandit Sant Ram Dogra's Code of Tribal Custom for the valley page 61 in answer to question number 75.

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Among Pandits of Srinagar formalities necessary to constitute a valid adoption are :— Rivaj-i-am cited :

(1) To give and take a boy in adoption, and
(2) To nominate or make one to nominate a son for adoption.†

Among all the Pandits on some auspicious day, settled before hand for the ceremony, the adoptive father goes to the house of the boy whom he wants to adopt as son. He takes with him garments for the boy and his mother. There he begs the father to give away the son in adoption. Thus a gift of the boy is made by the parents and in their default by the brother or the uncle of the boy. *Tonsure* and *Yagyopavite* cermonies are subsequently performed by the adoptive father. If the adopted son be already invested with the sacred thread, he cannot be adopted as son, *unless the adopted son be of the same family with the adoptive father.*‡

Case law referred:

In the case of Parasram versus Panjaboo,¶ Qayoom C. J. and Wazir J. held : "The plaintiff has hopelessly failed to prove that he was validly adopted by Kharkoo and that giving and taking ceremony was performed at the time of his adoption. There are no circumstances from which it could be gathered that the proper ceremonies were performed and the plaintiff was validly adopted. According to Mulla's Hindu Law, para 489 of 1936 edition, the physical act of giving and receiving is absolutely necessary to the validity of an adoption. The giving and taking ceremony is the essence of adoption and the law does not accept any substitute for it. Mere expression of consent or execution of a deed of adoption though registered but not accompanied by actual delivery of the boy does not operate as valid adoption. It is not the adoption deed that confers the status of an adopted son or any interest in the property of the adoptive father, but the adoption itself which in the case has not been proved. A perfectly valid adoption can be made without an adoption deed and status which the adopted son gets by adoption is due to the proper ceremonies being performed and not to any deed passed as evidence of that adoption. From the documentary and oral evidence produced by the plaintiff the *factum* of adoption has not been established and in our opinion, the trial court has rightly dismissed the suit of the plaintiff. We see no force in this appeal which is accordingly dismissed with costs."

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† Pandit Sant Ram Dogra's Tribal Custom page 67 in answer to question 75 (i) quoted completely at page 203 and 204 supra.
‡ Pandit Sant Ram Dogra's Tribal Custom page 67, in answer to question 75 (i) quoted at page 203 and 204 supra.
¶ 40 P. L. R., J. & K. section, page 42.

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55. Among all tribes living in the valley a bachelor, a blind man, a lame person or a widower can make valid adoptions ; but in case they are Zamindars they must be owning some property.

An ascetic cannot adopt a son, he can have *Kalifa* or *Chela*.

Exception :— Among Hindus of Srinagar a leper or an impotent cannot adopt at all.

Rivaj-i-am :

Question 75 (d)—Can the following persons adopt :—

(a) bachelor, (b) a man blind, impotent, or lame, (c) a widower, (d) an ascetic, who has renounced the world.

Answer :—

All Mussalman Tribes Except as Mentioned Below. (a) If a bachelor has got some property, he can adopt. (b) and (c) The person described in (b) and (c) in the question can adopt. (d) An ascetic does not adopt a son, but he can have a Khalifa.

But among the Sunni Mussalmans of Anantnag and Bijbehara towns, no custom exists regarding (c).

Sunni Mussalmans of Kulgam. Say that no custom regarding adoption by blind men exists.

Zamindars of Kund, Sunni Mussalmans of Achhabal, and Watals of Khanabal. No adoption has ever been made in the circumstances given in the question.

Watals of Pattan, Gujjar of Handwara, Sopore, and Badgam· Rajas of Yaripura, and Bomba Rajas of Utarmachipura. No custom·

All Hindu Tribes Except as Noted Below. Only an ascetic who has renounced the world can never adopt ; but he can have a *Chela*, provided he be a Mahant of Gaddi

Among the Pandits of Kulgam, an ascetic, who has renounced the world, seldom adopts.

Rajputs of Deosar, and Sikhs of Achhabal and Anantnag. No. custom regarding (a), (b), (c), and (d) ; though no objection is possible in the case.

Hindus of Baramulla. All the Sadhus except Sanyasis and Beragis, and persons discribed in the question can adopt.

Pandits of Srinagar. All persons except impotents and lepers can adopt.

The fact that the adopter is a bachelor or a widower or that his wife does not consent to the adoption or that she is at the time of adoption pregnant to his knowledge, does not prevent

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a Hindu from taking a son in adoption. This has been held in a large number of cases in British India. The same rule is followed in the valley as well.

56. **Among all tribes in the valley two persons cannot be simultaneously adopted. A second adoption can be made only after the death of the first adopted son** †

Exception :— Amongst all Sikhs if the first adopted son be disobedient, or may turn out to be an ill behaved boy, another boy can be adopted.

Authority :— Dina Nath versus Mohan Lal, decided by the High Court on the 20th of Katik, 1981.

Remarks :— The adoption of two boys simultaneously is neither customary nor permitted by the strict Hindu law. Nor is it customary amongst the Mohommadans of the valley In the case of Dina Nath versus Mohan Lal.‡ Mr. justice Kanwar Sain observed : "A second adoption cannot be valid in the life time of the first adoptee. If the widow took another boy as adopted son to her deceased husband while yet the first adopted son was alive, no estate will pass to the other and, therefore, the first adopted son may hold adversely not only to the adoptive mother but also to the second adopted son....."

Question 75 (c)—Can a man who has already adopted a son adopt another during the life time of the first ? Rivaj-i-am:

Answer :—

All Mussalman Tribes Except as Mentioned Below. Adoption of two boys is not customary ; but a second adoption can be made after the death of the one of the boys. Rarely a second boy is adopted in the lifetime of the first boy, and that only in case of urgent necessity. Among the zamindars only one boy is adopted, though they are at liberty to adopt two boys.

All Hindu Tribes and Sikhs of Achhabal and Khanabal. Adoption of only one boy is customary. Another son can not be adopted during the lifetime of the first.

All Sikhs Except as Noted Above and Below. If the first adopted son be disobedient, or may turn out to be an ill behaved son, another boy can be adopted.

Sikhs of Handwara. No custom.

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† Decided by the High Court on the 20th of Katik, 1981.
‡ Pandit Sant Ram Dogra's Code of Tribal Custom page 62, in answer to question number 75 (c).

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The present writer has not been able to find out any decided case in which a Sikh might have made a second adoption in the life time of the first adopted son.

57. Among Kashmiri Pandits of the valley the following persons cannot be adopted :—

(i) A person belonging to a different community :

(ii) A person who has already been adopted ;

(iii) A person belonging to a different *Gotra*, whose Yagnyopawit ceremony has been performed

A wife's brother can be a proper person to be appointed

Authorities :— For adoption of a wife's brother refer Dina Nath versus Mohan Lal, decided on the 20th of Katik, 1981. Refer also other cases cited in this chapter *ante*.

58. Among Sikhs of the valley adoption of a brother's daughter's son is valid by custom.

Authorities :— Gopal Singh versus Ranjit Singh decided on the 13th of Bahadoon, 1980.

59. Among all Mussalman tribes and Sikhs no age is specified for adoption. Amongst all Pandits the person adopted should be less than 8 years and a person cannot be validly adopted after investure with the sacred thread ceremony if the adoptee belongs to a *gotra* different from that of the adopter.

Remarks :— In regard to the making of an adoption there is no restriction as regards the age or the degree of relationship of the person to be appointed. But among all the Pandits a boy who has been invested with the sacred thread is not usually adopted. The effect of adoption being the transference of the adopted son from his natural family into the adoptive family, the Pandits regard that when the adopted boy has been invested with the sacred thread ceremony in his natural father's family, he will continue to be of his natural father's *gotra* and not that of his adoptive father's. Consequently, they regard that the adopted son cannot satisfy the spiritual needs of the adopter. But if the adopter belongs, to the same gotra to which the adopted son belongs, the rule of non-investure of the sacred thread is not so strictly followed. In that case it is essential that the adopted son should not have performed the obsequial rites of his natural parents.

Rivaj-i-am. *Question 75 (g)*—Must the person adopted be less than any specific age ? If so, upto what age may a person be adopted ?

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Can a person be adopted after tonsure or investiture with the sacred cord in his own family ?

Answer :—

All Mussalman Tribes and Sikhs Except as Mentioned Below :- No age is specified for adoption A person can be adopted generally by a deed in writing. Infants are generally adopted.

Gujjars of Baramulla and Sikhs of Handwara. Adoption is not prohibited, but it is very rare.

Gujjars of Sopore and Sansis of Badgam. No custom.

Gujjars and Bakkerwals of Nunar. Boys between 6 and 15 years are adopted.

All Pandits. The age of the person adopted should generally be between 4 and 8. A person cannot be adopted after investiture with the sacred thread. If the person adopted is of the same tribe (Sagotra) as the adoptive father, investiture is no bar to adoption, but it is necessary that he should not have performed the obsequial rites of his parents. But if the person adopted is of the same family as the adoptive father, performance of the obsequial rites of his natural parents is no hindrance to adoption.

Adoption of a 17 years old Kashmiri Brahman.

In a Punjab case where the parties were Kashmiri Brahmans, the adoption of a brother's son, aged seventeen who had been invested with the sacred thread, has been held valid by custom applicable to the parties.†

60. Among all Hindus living in the valley an adopted son cannot be disinherited for misconduct, disobedience, or neglect to support his adopted or *quasi* adopted father ; nor can the latter subsequently revoke or repudiate the adoption or appointment once lawfully made.

After adoption the adopted son becoms a coparcener with his adoptive father in the joint family property and the latter is consequently incompetent to bequeath or devise any part of the property in the presence of the adopted son.‡ "Among all Hindu tribes a father can disinherit his real son, but he cannot disinherit his adopted son on any ground whatsoever."¶

61. An adopted son can be disinherited for misconduct disobedience or neglect to support his adopted or *quasi* adopted

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† 1924, 5 Lahore 200, P. C. ‡ 1920, 2 Lahore 69.
¶ Pandit Sant Ram Dogra's Code of Tribal Custom page 69 in answer to question 75 (b).

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father amongst all Mussalman tribes in the valley

Exception :— Amongst Shias of Badgam if the gift is made adoption cannot be repudiated.

Authorities :— Mst. Khautani versus Ramzan Khan, civil appeal number 3 of 1994, decided by the High Court of Judicature on the 15 of Bahadoon. 1999.

Remarks :— The principle of the Hindu law of adoption is not followed by the Mussalmans of the valley. The customary adoption amongst Mussalmans is for the satisfaction of a sonless person of his secular needs; and if the adopted son turns out disobedient or neglects to support his adopted father he can be disinherited by his adoptive father.

Rivaj-i-am:

Question 75 (l)—Can an adopted son be disinherited for misconduct, disobedience, or neglect to support his adoptive father? Can the latter subsequently revoke or repudiate the adoption or appointment once lawfully made ?

Answer :—

All Mussalman Tribes Except as Below. An adopted son can be disinherited for disobedience.

Gujjars and Watals of Achhabal and Khanabal, and Bomba Rajas. No custom.

Shias of Badgam. If the gift is made, it cannot be repudiated ; if the gift is not made, adoption can be repudiated. The giver only is entitled to repudiate adoption.

All Hindu Tribes Except as Mentianed Below, Shup-Watals and Watals of Kulgam and Rajputs of Deosar A father can disinherit his real son, but he cannot disinherit his adopted son on any ground whatever.

What is disobedience:

In the case of Mst. Khautani versus Ramzan Khan† the Hon'ble Judges of the High Court, Ganga Nath C. J. and Massud J held that unpleasantness between the adopted father and the adopted son cannot be held to be sufficient for disinheritance.

62. On the death of the appointed heir his male issues succeed, and in default of such issues his widow takes his estate on the usual life interest.

Remarks :— On the death of the appointed heir his male issues succeed, as in the case of a natural son succeeding to his

† Civil appeal no. 3 of 1994, decided by the High Court of Judicature on the 15th of Bahadoon, 1999.

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natural father. In default of any male issues the estate devolves upon the widow, and she takes her usual life interest.

The present writer has not been able to find out any decided case in which among Muslim agriculturists the right of a son of an appointed heir who pre-deceases the appointer might have been judicially considered. In the Punjab the son of an appointed heir is not entitled to succeed to the property of the appointer in the event of the appointed heir having pre-deceased the appointer.† Amongst the Hindu tribes in the valley, the son of an adopted son pre-deceasing the adopter acquires the same rights of succession to his property which the son of his natural born son pre-deceasing him would have in the property. It is the humble opinion of the present writer that as the doctrine of representation is fully recognised amongst the agricultural tribes in the valley, the rule prevalent in the Punjab in this respect does not prevail here.

Succession to appointee :

Succession to adopted son :— Article 62 of this treatise lays down that on the death of an appointed heir his *male* issues succeed and in default of such issues his widow takes his estate on the usual life-interest and if he leaves no widow the property goes to the male collaterals of the appointer, if the estate consists of property over which the appointer had only restricted power of alienation (i. e where the property was ancestral property). Ordinarily, a daughter among the Muslim agricultural tribes, is excluded by near collaterals and as such the daughter or grand daughter of an appointed heir will be in no better position than the daughter or grand-daughter of the natural son of the appointer. Among Hindus a daughter succeeds in preference to the near collaterals ; and in respect to the succession of the daughter of an appointed son the same rule of Hindu law prevails which is observed in respect to the succession of the daughter of a natural born son.

63. Among Muslim agriculturists in the valley, if the appointed heir dies childless, and leaving no widow, the estate which he inherited from the person who appointed or affiliated him passes :—

(1) to his own natural heirs if the estate consists of property over which the appointer had an absolute power of disposal, and

(2) to the male collaterals of the appointer's family if

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† 1922, 3 Lahore 326, overruling 51 P. R. 1906 ante.

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the estate consists of property over which the appointer had only a restricted power of disposal.

The words used in the opening lines of this article *viz.* 'If the appointed heir dies childless' should be read as : 'If the appointed heir dies sonless.'

Remarks :— The principle of reversion as to the collaterals of the appointer as laid down in para 63 of this book is limited to the property which was ancestral in the hands of the appointer. The Rivaj-i-am of the valley is silent on this point ; nor has the present writer been able to find out any decided case of any court in Kashmir on the point. The proposition laid down in para 63 of the Digest is in conformity with the custom prevalent in some other provinces in India and to the best knowledge of the writer is followed in the valley as well.

64. Among Muslim agriculturists in the valley a pisar-parwardah was also entitled to succeed to the Lambardari of the person who had appointed him as such.

Authorities :— Khaliq Rathar son of Karim of Badgam versus Ahad Bhat, pisar parwardah of Rahman Rathar of Badgam decided by the Revenue Commissioner on the 24th of Sawan, 1999.

In the above mentioned case the learned Revenue Commissioner held : "The findings arrived at by the governor are founded on some authoritative rulings of this court in Khera Malik versus Mohommad Sheikh of 1997, and the Hon'ble High Court of Judicature in Ismail Bhat versus Khaliq Bhat of 1989 in which it has been held that a pisar parwardah who succeeds to the property of his adoptive father, is entitled to succeed to him as Lambardar as well. I have no reason to disbelieve this view.....".

Appointment to the post of a Lumbardar is now governed by notification forming annexure to cabinet order No 336–C of 1956 dated 17 February published in Govt. Gazzette dated 8th of March 1956 read with Zaildari and Lumbardari Rules of 2005.

65. Mutations in cases of adoptions should be decided by the Tehsildars.

Authority :— Para 29 of Standing Order No. 23–(A); Nand Lal versus Sarup Chand, decided by Mr. P. C. Mogha, Revenue Minister, on the 20th of July, 1939, corresponding to the 5th of Sawan, 1996.

In the above mentioned case the learned Revenue Minister

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held as under : "...For the first point reliance is placed on para 29 of Standing Order no. 23—A which provides that mutation under paragraph 64 (a) of the Standing Order concerning adoption should be decided by a Tehsildar."

Rule 64 (a) of Standing Order No 23—A reads as under :—

"If the adoption is by a registered deed the mutation should be entered in the name of the adopted son, otherwise mutation will be entered in favour of the heirs of the deceased who hold the possession of the land. But if the adopted son is in cultivating possession of the land and the deed of adoption is unregistered deed, then according to Circular No. 1 of 19th Assuj 1953 the name of the adopted son can be entered in the mutation."

Rule number 29 of the Standing Order referred to above reads as below :—

" Under Section 33 (4) of Jammu and Kashmir Land Revenue Regulation No. I of 1980 any Revenue Officer can pass such order as he thinks fit with respect to each new entry brought on the mutation register by the Patwari. In practice however, nearly the whole of the attestation of mutation work is disposed of by Tahsildars and Naib-Tehsildars who are empowered to attest all mutations, disputed as well as undisputed, whether they relate to proprietary, *Malguzari*, *Assami* or occupancy rights :-

Provided :—

(*i*) that no Naib-Tahsildars other than of the first grade, can attest a disputed mutation except when specially authorised in Tehsils under Settlement with the sanction of the Settlement Commissioner and in other Tehsils with that of the Revenue Minister :

(*ii*) that mutations

(*a*) under paragraph 64 (*a*) of this Standing Order *concerning adoptions* ;

(*b*) under paragraph 64 (*b*) (1) concerning *Khana Nashin* daughter etc.;

(*c*) under paragraph 74 concerning sale and mortgage by oral agreement ;

(*d*) under paragraph 83 regarding *Razamandi* or gift in favour of hereditary State subjects ;

(*e*) under paragraph 85 for grant or inheritance of occupancy right, whether holding under a land-holder or direct from the State ;

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(*f*) under paragraph 87 (*b*) regarding *Nautor* in Ladakh and Gilgit Districts ;

(*g*) under paragraph 92 for construction of *Gharats* etc. ;

(*h*) under paragraph 95 regarding abandonment of cultivation by occupancy tenants ;

(*i*) under paragraph 98 regarding abandonment, removal or dismissal of *Sarbarahs* acting for insane persons;

(*j*) under paragraph 99 sub-para 48 (a) for direction to omit the entry of *"Ghair Hazir"* or *Ghair Qabiz"* in undisputed cases ;

(*k*) under paragraph 100 clauses 2, 3, 4 and 5 regarding *Sehat Indraj* ;

(*l*) under rule 9 of the Rules (appended to this Standing Order) regarding entry of *Shamilat* for the Jammu Province issued in connection with Raj Tilak Boon No. 4 ;

(*m*) *Shamilat* mutations in connection with Raj Tilak Boon No. 4 in the Kashmir valley ;

should be attested by the Tahsildars ."

66. Limitation for obtaining a declaration that an alleged adoption is invalid or never in fact took place is governed by Article 117 of the State Limitation Act, corresponding to Article 118 of the Indian Limitation Act. The period of limitation for such suits in six year, and the time from which period begins to run is the date when the alleged adoption becomes known to the plaintiff

Article 118 of the State Limitation Act prescribes period of limitation for suits to obtain a declaration that an adoption is valid. The period of limitation for such suits is six years and the time from which period begins to run is the date when the rights of the adopted son as such are interferred with.

Remarks :— Time under Article 117 of the State Limitation Act runs from the date when the alleged adoption becomes known to the plaintiff. The fact that the person making the adoption was alive within six years before the suit, or the fact that the widow of the adoptive father admits the title of the adopted son, cannot save the bar of limitation. To constitute knowledge under the Article the knowledge need not necessarily have been obtained first hand. There must, however, be some foundation in fact and the question how far that condition is

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satisfied is a question of degree only to be solved by reference to the facts of each case.†

"Time under Article 118 runs from the date when the 'right to sue' accrues. The words 'right to sue' mean a right to seek relief, *i. e.*, a right to prosecute by law, to obtain a relief by means of legal procedure.‡ In other words a right to sue accrues when a *cause of action* arises.¶ In order that there may accrue a right to sue there must first have come into existence the substantive right asserted in the suit, and secondly, such right must have been infringed or threatened to be infringed. The right and its infringement or threat of infringement constitute the cause of action and give rise to a right to sue.

Cause of action:

A Hindu widow in possession of property adopted a son to her deceased husband. The person presumatively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid. It is to this class of suits that this particular article *viz.* Article 117 of the State Limitation Act applies. The date from which time begins to run is a subjective or personal date; and the condition of obtaining the particular relief which is sought in a declaratory suit is that the plaintiff should not be guilty of *laches*, the measure of *laches* being fixed by the Statute as six years. But, if a claimant chooses to run the risk that an adoption which he has not attacked will have every presumption made in its favour by reason of its long standing, he can wait till his reversionary right has accrued and even till the limit (no doubt a very wide limit) of twelve years from that accruer has passed ††

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† A. I. R. 1916 Mad. 897: 29 I. C. 785.
‡ A. I. R. 1914 Mad. 708. ¶ A. I. R. 1930 Mad. 173.
†† 1927 A. I. R. Mad. 785.

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CHAPTER VIII.

LAW OF SUCCESSION

Before discussing the law of inheritance in the valley as modified by custom it will not be out of place to discuss here the elementary principles of the personal law of inheritance of the inhabitants of the valley. Apprarka's commentary on Yajnavalkya is followed as an authority by the Pandits of the valley. There is not any marked difference between Apprarka's commentary on Yajnavalkya and that of Vijyaneswar's commentary on Yajnavalkya; and as in the Mitakshara system, the devolution of property among the Hindu inhabitants of the valley who follow Hindu Law, as distinguished from custom, is regulated by two modes, *viz.* survivorship and succession. The first applies to joint family properties and the second to properties held in absolute severality by the last owner. Consequently every member of the Hindu joint family under this system has an undivided and unascertained family property and the share of each member is liable to increase and diminution by the birth and death of other coparceners before the partition. Under the Mitakshara system the term *'daya'* or 'heritage' signifies that 'wealth' which becomes the property of the other solely by relation to the owner. The wealth of the father or the paternal grandfathers becomes the property of his sons and grandsons in right of their being his sons and grandsons. The property devolves on parents or uncles brother and *'the rest'* upon the demise of the owner, if there be no male issue in right of their being his uncles or brothers. Therefore, under the system of Hindu law prevalent in the valley it is a settled point that property in the paternal or ancestral estate is by *'birth'* and not by *'demise'* of the last owner.

Apararka:

Apararka or Aparaditya, a king of Konkan, belonging to the dynasty of Silaharas (Refer Dr. Sarvadhikari's Tagore Law Lectures for 1880 contained in 'Hindu Law of Inheritance by Sarvadhikari 2nd edition pages 290—294.) flourished in the twelfth century and was one of the great commentators on the Yajnavalkya sumrati. He was descended from Jimutervahana of Vidhyadhara race and devoted himself to the persuit of knowledge. His work is of paramount authority in Kashmir and is referred to with respect in many of the later Digests. Refer Mayne on Hindu Law and usage (10th edition) page 43. Vijanesvara, the author of the Mitakashara school of Hindu Law, dos not make any reference to Apararka's treatise; nor does the latter make the least mention of the Mitakshara. The doctrines propounded by both the authors are often the same; but it does not appear

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whether the one borrowed from the other, or whether both of them were indebted to a common source for the principles they laid down. As pointed out by Dr. Sarvadhikari (Tagore Law Lectures for 1880) Vijanesvara borrowed largely from Bisvarupa But it is not certain whether Apararka owed any of his doctrines to the teacher of Vijanesvara. The learned Dr. suggests that the probable reason why Apararka, who flourished nearly a hundred years after Vijanesvara, did not refer to Vijanasvara was that the former was a sovereign the latter only a minister of a sovereign it being against Indian etiquette to make any public mention of the servant of a king, and to ignore the existance of his master. Apararka being a royal author would not care to notice the discrepancies between him and the servant of a neighbouring state. (refer Dr. Sarvadhikari's Hindu Law of Inheritance 2nd edition page 293) A reference of Apararka has also been made by the then Lordships of the Judicial Committee in the case of Budh Singh versus Laltu Singh (I.L.R 37 Allah. 604, 617, 618) There Lordships in the judgement at page 61 have observed :– "Turning now very briefly to the other authorities to which their Lordship's attention was called, they observe that Apararka another scholiast of Yajnavalkya who flourished about a century later than Vijaneswara, dealing with the same text on which the author of the Mitakshara has commented at such length, construes as pointed out by the High Court, the expression "brother's sons and 'uncle's sons' in a wider sense. That Apararka's authority, is acknowledged by the expositors of the Benares school is clear from the fact, to which Mr. Mandlik refers, that Viswaswara Bhatta, the author of the *Subodhini,* a commentary on the Mitakshara, has used Apararka's work among others for the compilation of his *Madanaparijata*. Parts of Apararaka's treatise and of the Madanaparijata have been translated by Dr. Sarvadhikari and are to be found in his Tagore Lectures for 1880."

A considerable portion of Apararka's authority has been translated in 21 Madrass Law Journal at pages 10, 49, 93, 150, 196, 254, 305, 365, 432 and 483 and some portion of it has been translated in Ghose's Hindu Law (ii) at pages 238-272. Professor Sarvadhikari has also tried to translate some portion of Apararka's concerned text and that translation of the learned Professor is to be found in his Tagore Law lectures on the Hindu Law of Inheritance for the year 1980 (2nd edition) at pages 329 to 332. The portion that is relevant to our present purpose so far as Apararka's authority on the law of succession in Kashmir is concerned is given by Professor Sarvadhikari, as translated from the original text, in the following words :- (Refer Tagore Law Lectures by Professor Sarvadhikari for the year 1980, 2nd edition pages 329 to 332.)

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"Among grandsons by different fathers, the allotment of shares is according to the fathers. (Refer Yajnavalkya, II, 120) The meaning is, that the grandsons do not share equally with their uncles. If an unseparated brother dies leaving, male issue, the nephew gets his father's share from his uncle.

The son of the nephew also is entitled, on failure of the nephew, to his grand father's share. But the grandson of the nephew has no claim to the paternal property.

On failure of male issue, a faithful widow is entitled to the whole of her husbands property which was acquired by him without any detriment to his paternal estate If the widow be young and suspected of unchastity, her claim should be overlooked and the inheritance should devolve upon the brothers. In dividing the property among brothers the following rule should be observed. If the property was jointly acquired by the brothers without any detriment to the paternal property, then the surviving brothers should equally share it amongst themselves, in preference to their parents. But if the estate claimed was ancestral property, then the parents shall exclude the brothers.

The vedic text that "women are devoid of sense, and are therefore, not entitled to inheritance," should be explained in the following manner. They are not entitled to inherit, if there be male issue.

Daughter succeeds on failure of the widow ; and the parents come after them. *Of the parents the father succeeds first and then the mother.*

In default of the parents, the brothers are heirs. Of these the uterine brothers are preferred to the half brothers, for the former are nearer than the latter. The Uterine brothers are entitled to perform the *Shardha* of maternal kinsmen, and half brothers have no right to do so.

The sons of brothers come after the brothers.

On failure of nephews, the *gotrajas* are heirs. Of these the nearer is first to the property.

Manu ordains : "The propinquous kinsman of the deceased (sapinda) inherits his property" Refer Manu IX, 187. The heritable propinquity also has thus been explained by him : "To three ancestors must water be given, etc." Manu IX, 186. That person who gives the water and the cake to any of the three paternal ancestors to whom the deceased was bound to present them, is a propinquous sapinda of the deceased ; and

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the descendants of the same person, who give the water and the cake to any of the ancestors to whom the deceased was bound to give them, are also propinquous sapinda of the deceased. Among these the uterine brother is a nearer sapinda to the deceased than any other kinsman, because he presents the water and the cake to the same ancestors on whom the deceased was bound to confer them. The nephew is a little more remote than the uterine brother, because the former gives a cake (to his father, which has no connection whatever with the deceased). The son of the nephew is more remote than the nephew himself, because that son presents two pindas (to his father and grand father) which have no connection whatever with the deceased. Similarly, any other description of brother, his son, and grandson (are related in different heritable degrees to the deceased).

Thus we see that according to Apararka, the son of the nephew inherits in default of the nephew, and as pointed out by the Judicial Committee Apararka construes the expression "brother's sons and uncle's sons" in a wider sense.

In default of gotrajas, the bandhus take the heritage. These 'are the sons of the father's sister, mother's sister, and maternal uncle's sons, and *similar kinsmen*.

On failure of bandhus, first the pupil and then the fellow student and successors.

It will not be out of place to make a further elucidation on Apararka's views about the succession of gotraja sapindas. According to him, the preferable right of a gotraja Sapinda rests upon his presenting the largest number of beneficial oblations either directly to the deceased, or to the ancestors to whom the deceased was bound to present them. The uterine brother presents three oblations to paternal ancestors and three to maternal ancestors, which the deceased himself was bound to give. He is therefore, preferred to the step brother, who presents one set of oblations to the three paternal ancestors only, and not to the maternal ancestors. The nephew presents two oblations which the deceased was bound to offer. Thus in the father's line we have, according to Apararka, three sapindas namely. Ist the brother, 2nd the nephew; and 3rd the brothers grandson. The brother presents the largest number of beneficial oblation ; his son presents one less ; and his grandson two less. The preferable right being measured by the extent to which the benefits are confered, the brother takes the first rank as an heir, the nephew occupies the second rank, and the brothers grandson takes the third rank. These three kinsmen are called *propinguous sapindas* of the deceased and they exclude the three remote descendants of the father namely the son, grandson and the great grand son of the great grand son of the father.

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According to Professor Sarvadhikari's translation Apararka does not mention the parents and other ancestors of the deceased after the sons of the nefhews. The learned professor thinks, and rightly too, that there was no necessity for making any special mention of the 'parrents', because they have been already provided for by the text of Yajnavalkya enumerating the different classes of heirs. As the parents take the lead in their own line so the grandmother and the grandfather, the great grandmother and the great grandfather, head their respective lines.

Graphic view of the order of succession among Hindus according to Apararka :—

The following table of succession of sapinda heirs will make clear the order of succession obtaining among Hindus according to Apararka.

F44	A_6 45	x 46	x 47	x 48	...	...	y_1 55	y_2 56	y_3 57
E39	A_5 40	x_1 41	x_2 42	x_3 43	...	...	y_1 52	y_2 53	y_3 54
D34	A_4 35	x_1 36	x_2 37	x_3 38	...	...	y_1 49	y_2 50	y_3 51
⋮									
C17	A_3 18	x_1 19	x_2 20	x_3 21	...	...	y_1 31	y_2 32	y_3 33
B12	A_2 13	x_1 14	x_2 15	x_3 16	...	...	y_1 28	y_2 29	y_3 30
A7	A_1 8	x_1 9	x_2 10	x_3 11	...	...	y_1 25	y_2 26	y_3 27

D5 (daughter) — P — W4(widow)

i — a1

Ds.6 (daughter's son) — b2

c3

⋮

d22

e23

f24

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In this graph :

(1) a, b, c, represent the son, the grandson, and the great grandson of the deceased.

(2) d, e, f, are the son, the grandson, and the great grandson of the great grand son of the deceased.

(3) A, B, C, D, E, and F represent the first six male ancestors of the deceased.

(4) A_1, A_2, A_3, A_4, A_5 & A_6 represent the first six female ancestors of the deceased namely his mother, grandmother, great grandmother, and so on.

(5) x_1, x_2, x_3 are the son, the grandson, and the great grand son of A, B, C, in each line.

(6) y_1, y_2, y_3 are the son, the grandson, and the great grandson of x_3 in each line.

(7) D's Represents the daughter's son.

(8) The dotted lines indicate a break in the continuity of succession.

It will be observed that this chart does not include the heirs introduced by the Hindu Law of Inheritance Act 1997, Act No. XVII of 1997. If we include those heirs also in this chart the heirs next after a father's father and before a father's brother will be son's daughter, daughter's daughter, sister and sister's son.

It is not within the purview of this work to discuss in detail the succession of Sammanodakas and the Bandhus. Suffice it to say that the succession among the Hindus of Kashmir is identical to its succession of the Sammanodakas and Bandhus of the Hindus belonging to the Benaras school of Hindu Law.

New legislation.

The question relating to succession of a Hindu dying intestate or otherwise are now governed by the "Hindu succession Act" of the year 1956. The general rule of intestate succession covered by chapter II of the Act provides as follows : –

Coparcenary property.

Under section 5 of the Hindu Succession Act when a male Hindu dies after the commencement of the Act itself, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivor ship upon the surviving members of the coparcenary. But if the deceased had left him surviving a female relative specified in clause I of the schedule attached to the Act itself or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara copar-

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cenary property shall devolve by testamentary or intestate succession, as the case may be under the Hindu succession Act and not by survivorship. The interest of a Hindu Mitakshara coparcener referred to in section 5 of the Hindu succession Act is deemed to be the share in the property that would have been alloted to him if partition of the property had taken place immediately before his death irrespective of whether he was entitled to claim partition or not.

Intestate succession.

The property of a male Hindu dying intestate devolves according to the provisions contained in sections 6, 7, 8, 9, 10 to 26 of chapter II of the Hindu Succession Act. According to section 6 of the Act the property of a Hindu dying intestate devolves firstly upon the heirs, being the relatives specified in class I of the scehdule attached to the Act ; secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the schedule ; thirdly if there is no heir of any of the two classes, then upon the agnates of deceased ; and lastly, if there is no agnate, then upon the cognate of the deceased. For facility of ready reference the heirs of class I and class II specified in the schedule attached to the Hindu Succession Act are given below :—

Heirs in Class I and Class II.

CLASS I

Son ; daughter ; widow ; mother ; son of a predeceased son ; daughter of a predeceased son ; son of a predeceased daughter ; daughter of a predeceased daughter ; widow of a predeceased son ; son of a predeceased son of a predeceased son ; daughter of a predeceased son of a predeceased son ; widow of a predeceased son of a predeceased son.

CLASS II

I. Father.

II. (1) Son's daughter's son; (2) son's daughter's daughter ; (3) brother; (4) sister.

III. (1) Daughter's daughter's son, (4) daughter's daughter's daughter.

IV. (1) Brother's son, (2) sister's son, (3) brother's daughter (4) sister's daughter.

V. Father's father ; father's mother.

VI. Father's widow ; brother's widow

VII. Father's brother ; father 's sister.

VIII. Mother's father ; mother's mother.

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IX. Mother's brother ; mother's sister.

But in the schedule, references to a brother or sister do not include references to a brother or sister by utrine blood.

Section 7 of the Act specifies that among the heirs specified in the schedule, those in Class I shall take simultaneously and to the exclusion of all other heirs ; those in the first entery in Class II shall be preferred to those in the second entry ; those in the second entry shall be preferred to those in the third entry ; and so on in succession. The distribution of property among heirs in class I of the schedule is to be made in accordance with the rules specified in section 8 of the Act. The property of an intestate shall, however, be divided between the heirs specified, in any one entry in Class II of the schedule so that they share equally. The rules regarding order of succession among agnates and cognates is to be made in accordance with rules specified in section 10 and 11 of the Act. The rules of succession in the case of female Hindus is covered by section 13 of the Act The Act forms an appendix to this book and can be referred there.

The guiding principles of the law of inheritance under every school of Hindu Law is derived from Yajnavalkya's text. Writes Yajnavalkya : "The sons, principle and secondary, take the heritage of the father ; and on failure of sons the following is the order of succession to the separate property of a person: the wife, and the daughters *also*, *both* parents, brothers *likewise* and their sons, gentiles or *gotrajas*, cognates a pupil and a fellow student ; on failure of the first among these the next in order is indeed heir to the estate of one who departed for heavens leaving no *putra* or male issue." This rule extends to all persons and classes who follow Hindu law in the valley as distinguished from custom. 'The son' here signifies according to the Privy Council decision in the case of† Budh Singh versus Laltu Singh son, grandson and great grandson. In the first place the wife shares the estate of her husband and it is a settled rule that wedded wife being chaste, takes the whole estate of her husband who being separated from his co-heirs and not being subsequently re-united with them die leaving no issue. On failure of the wife the daughters inherit. The plural number in daughters suggest the equal or unequal participation of daughters alike or dissimilar by class. If there be competition between the married and unmarried daughters, the unmarried daughters take the succession. Similarly between an unprovided and rich daughters, the unprovided ones inherit first. But on failure of such the rich daughters suc.

† I. L. R. 37 Allah 604, at 617, 618.

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ceed. According to the Privy Council decision in the case of Oudh versus Ganga† the pecuniary condition is not to be examined minutely so as to find out if there is any shade of difference in their circumstances; but it is only to be seen whether there is any marked degree of difference in such condition so as to give one prior right over the other. By the import of the particle *'also'* in Yajnavalkya's text the daughter's son succeeds to the estate on failure of daughters. Then the parents *i. e.*, the mother and the father. Under the Mitakshara system the mother succeeds first because the word mother stands first in the compound word *'Matri-pitran'* meaning parents. Besides the father is a common parent to other sons but the mother is not so, and her propinquity is consequently greater and she should succeed first confirmably to the text. "To the nearest *sapinda* the inheritance next belongs." On failure of mother, the father succeeds. After father bretheren have the estate. Among brothers those of the whole blood or uterine‡ brothers succeed first, then those of the half blood, since these are remote through the difference of mothers. On failure of brothers also, their sons share the heritage in the order of their respective fathers. In case of competition between brothers and nephews, the nephews have no title to the succession; for their right of inheritance is declared to be on failure of brothers. (see Ganga Sahai versus Keshari 37 Allah 545.)

If there be not even brother's sons, gentiles (gotrajas) share the estate. Gentiles are the paternal grandmother and sapindas and samanodakas. In the first place, the paternal grandmother takes the inheritance. On failure of the paternal grandmother, the sagotra sapindas, or blood relations sprung from the same family with the deceased namely, the paternal grand father and the rest inherit the estate. For *bhinna gotra sapinda*, or sapindas sprung from a different family, but connected by consanguity with the deceased, are indicated by the term bandhu or cognate.

Here, on failure of the father's descendants, the heirs are successively the paternal grand mother, the paternal grandfather, the uncles and their sons.

On failure of the paternal grand fathers line, the paternal great grand mother, the great grand father his sons and their issue inherit. In like manner, up to the seventh degrees, must be understood the succession of kindred, known as *sagotra sapindas*. If there be none such, the succession devolves on samanodakas; and they must be understood to reach the seven degrees beyond the kindred known as sapindas; or else, as far as the limits of knowledge as to birth and name extend. Accordingly Manu

† 2 Allahabad page 561.
‡ Meaning of the same mother.

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says: "The relation of sapindas ceases with the seventh person; and that of Samanodakas extends to the fourteenth degree, or as some affirm, it reaches as far as the memory of birth and names extends. This is signified by *gotra*, or the relation of family name."

On failure of gentiles (bandhus) are heirs. Cognates are of three kinds—related to the person himself, to his father, or to his mother, as is declared by the following text: "The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his *awn cognate kindreds*. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his *father's cognate kindreds*. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred."

Bandhus.

I	His own father's sister's son (1)	}	His own bandhus (*Atma bandhus*)
	,, ,, mother's ,, ,, (2)		
	,, ,, maternal uncle's ,, (3)		
II	Father's father's sister's son (4)	}	Fathers bandhus (*Pitri bandhus*)
	,, mother's ,, ,, (5)		
	,, maternal uncle's ,, (6)		
III	Mother's father's sister's son (7)	}	Mother's bandhus (*Matri bandhus*)
	,, mother's ,, ,, (8)		
	,, maternal uncle's ,, (9)		

If there be no relations of the deceased the preceptor, or, on failure of him, the pupil, inherits. If there be no pupil, the fellow student is the successor. If there be no fellow student a learned and venerable priest should take the property of a *Brahmana*. Never shall a king take the wealth of a priest. But the king, and not a priest may take the estate of a Kashattriya or other person of an inferior tribe, on failure of heirs down to the fellow—student.

Mohommadan law of inheritance:

The Mohommadan law of inheritance has always been known to possess distinguishing features of its own which are different from other systems of law. The scheme of inheritance provides not only for the selection of a single individual or homogeneous group of individuals on whom the estate of the deceased devolves but for adjusting the competitive claims of all the nearest relations.

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The strict Mohommadan law makes no distinction between ancestral and self-acquired property and recognises no principle of differentiation in the matter of lineal and collateral succession as is the case under Mitakshara which divides inheritance into obstracted and unobstracted inheritance. All classes of property whether ancestral or self-acquired follow one rule of devolution.† Primogeniture does not confer any superior right and all sons, whatever the number, inherit equally.

There is no such thing as a joint family or a coparcenary body under the strict Mohommadan law in the sense in which the expression is used in Hindu Law. The heir is to be ascertained at the time of the death of the deceased and a person cannot succeed as a representative of some one who has predeceased the owner. A person has no right to the property of his ancestor, and, therefore, such a deceased person who has himself no vested right cannot give it to his descendants.

Inheritance as modified by custom in Kashmir :

There are four leading canons governing succession to an estate among agriculturists. First, that male descendants invariably exclude the widow and all other relations Second, that when the male line of descendants has died out, it is treated as never having existed, the last male who left descendants being regarded as the owner. In the third place, a right of representation exists, whereby descendants in different degrees from a common ancestor if alive would succeed to. Fourthly, females, other than the widow or mother of the deceased, are usually excluded by near male collaterals, an exception being allowed in favour of daughters or their issues and sisters or their issues, chiefly amongst tribes that are strictly endogamous.

In the case of several sons the ordinary rule is, that they take *per capita* and equally, primogeniture not being recognised except as previously in the case of Jagirdars or in regard to the succession to the post of a *Lambardar*. In some cases an eldest son is allowed an extra share, and amongst some tribes division in the case of sons by different wives is *per stripes* : these, however, are exceptional cases and those who claim a right of this kind must be called upon to prove that it is recognised by the custom applicable to them.

In Kashmir, though the Zamindars have been converted to Mohommadanism for nearly six centuries past, they still retain their old custom of living on the lines of Hindu joint family system. The regard for the head of the family was so great that some instances can be quoted in which the head's name was entered in the revenue records for all the other co-sharers of the landed property.

† 43, I. A. 269

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67. Sons and Khana Nashin daughters are first entitled to the inheritance whether the deceased was joint with others or not.

Illustration.

A, a Muslim agriculturist living in the valley, dies leaving one son B and one daughter C. B will succeed to the entire agricultural land belonging to A and C will get nothing. C shall succeed equally with B if she is a Khana Nashin Dukhtar of her father ; otherwise not. Under the ordinary Mohommadan law A's estate would be divided between his son B and daughter C in the ratio of 2 : 1.

Authorities :— Mst. Rahmati daughter of Jamal Bhat of Kulgam versus Samad son of Lassi Ganai, decided by the Revenue Commissioner on the 9th of Sawan, 1997 corresponding to the 23rd of July, 1940 ; Ali and others versus Rajab and others decided by a division bench of the High Court on the 30th of Bahadun, 1995 ; Asad Wani versus Tyub and others decided by the Revenue Commissioner on the 22nd of Jeth, 1995, corresponding to the 4th of June, 1938 ; Ahad Bhat versus Ali Bhat, decided by the Revenue Commissioner on the 19th of Bahadoon, 1995, corresponding to the 3rd of September, 1938 ; Rasul versus Akbar minor, decided by the Revenue Commissioner on the 6th of August, 1938, corresponding to the 22nd of Sawan, 1995.

Remark 1 :–The general rule of succession under the Customary Law in the Kashmir valley is that succession first goes to the direct male lineal descendants of the last owner to the exclusion of female descendants, excepting in the case of daughters who have been married at home by their father's in their life time. If there be no male lineal descendants of the last male owner, subject to certain life estates in favour of some females, the inheritance devolves upon the collaterals among whom the right of representation exists, all heirs sharing equally by degrees.

Remark 2 :— Where a Muslim agriculturists living in the valley, dies leaving male and female issues, the sons exclude the daughters according to the custom prevalent in the valley. But the initial onus of proving that the parties are governed by custom must be laid upon the person asserting it.† In the case of Hindus the daughters are excluded outright in the presence of sons both under the Hindu law as well as the custom prevalent in the valley.

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† Refer section 4 J. & K. Consolidation Regulation.

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Among all Mussalman tribes if a man dies leaving a widow, a son, a daughter, brothers or relatives, the inheritance devolves upon the son or sons first. If the widow has a son, she does not inherit, because her own sons do inherit through her. If the widow be childless and she has sons of her husband by another wife she gets *mahar* only, and sometimes a plot of land for maintenance till remarriage.† Certain exceptions have been mentioned by the Pandit in his Code of Tribal Custom to this general rule. For instance he mentions that among the *Wains* of Shopian Kulgam Tehsil, the Mussalmans follow the *Shariat* regarding moveable property, but not about inheritance of land.‡ Further on the same page the Pandit mentions that Shias of all Tehsils follow the *Shariat.* But sisters or daughters married outside their village get heritage in cash and kind but not landed property. They are arranged to acquisce in such a settlement as a matter of course.

Among all Pandits sons are the first heirs followed by widows in absence of the sons of the deceased. Agnates inherit in absence of widows, and they are followed by *Prohits* and rarely by *Sagotras.* Pandits of Srinagar have a distinctive custom of inheritance regarding widows receiving only maintenance if the property be joint with their deceased husband's sons If the property be divided, daughters inherit in default of sons. If the property be joint daughters get nothing but dowry and are married. The expenses and the after-expenses of marriage are met from the property of the deceased father. The rest of the property devolves upon his brothers. Refer question 40 and its answer referred above.

Remark 3:— An adopted son (appointed heir) succeeds to all the rights and interests held or enjoyed by the adoptive father or appointer. The appointed heir was also entitled to succeed even to the *Lambardari* of his appointer ¶ See also article 45 *ante.*

Murderer's succession:

Murderer and his descendants excluded from inheritance: Where a person has been murdered with the sole object of securing his property, the murderer as well as his son are excluded from inheriting the property of the deceased, notwithstanding that it is ancestral property, as their succession would be opposed to public policy †† The murderer's right in such a case is swept away and

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† Pandit Sant Ram Dogra's Code of Tribal Custom answer to question number 40 incorporated completely in this book at page 106.

‡ Refer Dogra's Tribal Custom page 48

¶ Khaliq Rathar son of Karim of Badgam versus Ahad Bhat, decided by the Revenue Commissioner on the 24th of Sawan; 1999.

†† A. I. R. 1922 Lah. 243; A. I. R. 1924 Lah 505; See also 1924, 48 Bomb P. C. affirming 1920, 45 Bomb 768 and also Mulla's Hindu law 5th edition page 107.

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with it is carried away the right of every one who claims through (and not merely from him). "As Indar Singh (the son) derives his right to succeed through, though not from his father (Ram Singh), his right to succeed is taken away by the criminal act of Ram Singh. This principle is based on public policy and justice, and the Hindu, Mohommadan or Customary Law on the point need not be considered."†

Partition.

Under the Hindu Law (Mitakshara system) a son has an unrestricted right to maintain a suit for partition of the joint family property, even during the life time of his father.‡ The same rule of Hindu Law is followed among the Hindus of the valley as well. Unlike the custom in the Punjab where a Hindu son cannot enforce partition during the life time of his father, in the Kashmir valley a son of a Hindu father has got an unrestricted power to file a suit for partition even during the life time of his father. But among the Mohommadans of the valley, a son cannot by custom or otherwise enforce partition of ancestral immoveable property during his father's life time.

68 As a general rule, sons whether by the same or different wives share equally.

Explanation I :— Among all tribes if a man have more than one son partition is made equally on the number of sons. Custom of *Pagwand* obtains.

Explanation II :— The fact that one of her brothers has inherited some property from his maternal grandfather does not deprive him of the right of succession to the property of his natural father.

Exception :— Pandit Sant Ram Dogra in answer to question number 41 writes that among Gujjars of Nandimarg and Rajputs of Deasar the custom of *Chundawand* obtains.

Pagvand and Chundavand explained :

'Pagvand' is a word used where an estate is distributed in equal shares amongst the sons from *pag*, a turban, and corresponds exactly to the phrase *per capita*. *Chundavand* is from *chunda* which means hair braided on the top of the head, and is applied where the division is governed by the number of mothers; the sons, however few, by one wife take a share equal to that of the sons, however many, by another wife.¶

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† A. I. R. 1922 Lah 293, 3 Lah. 103.
‡ 1927, 101 Ind. Cas. 483 Sind, case law cited.
¶ Refer the observations of Sir Merrdyth Plowden as to the derivation of the terms, pagvand and chundavand, in 4 P. R., 1891 (F. B.) at page 17.

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Remark :— The normal custom in the Kashmir valley is undoubtedly division according to the *Pagvand* rule, where the sons are the unites ; while the *chundavand i. e*, where the wives are the unites, is an exception which requires special reason to account for. The onus lies heavily upon the person who relies upon the *Chundavand* rule † Also when it is found that the parties to a suit follow the *Pagvand* rule of succession, the onus of proving that the whole blood excludes the half lies on the party alleging it.‡

Eldest son.

As a general rule an eldest son shares equally with his brothers. But some times an eldest son is allowed an extra share. For instance in the case of Gujjars of Nandimarg, Avantipura, Kulgam and Baramulla Tehsils and Sopore the eldest son gets *Sardari* share, one she-buffalo and one or two *traks* of land are given to him more than his share.

The rule of primogeniture prevails in families of ruling Chiefs, or of Jagirdars whose ancestors were ruling Chiefs : but in some cases the eldest brother is allowed a some-what larger share than his younger brothers.

Rivaj-i-am:

Question 41 :— If there be more sons than one, will they take equal shares ? If the sons do not take equal shares, state upon what principles the shares are regulated ? *Pagwand* or *Chundwand.*

Is any regard had to uterine descent ? Are the shares in the inheritance distributed according to the number of mothers ?

Answer—

All Tribes Except as Noted Below. If a man have more than one son, partition is made equally on the number of sons. Custom of *Pagwand* obtains.

Mussalmans of all Tehsils add that Pichhalag (or step-son, born to a previous husband) does not inherit but by gift.

The Sunnis of Bijbehara and Anantnag town, Pirs, Babas, and Sayeds of Chharat add that sons of the same mother get equal shares, and those by different mothers get equal shares after deduction of the dowers of their mothers.

Gujjars of Nandimarg and Rajputs of Deosar. Custom of *Chundawand* prevails.

Bomba Rajas of Yaripura and Uttarmachipura. Custom of *Pagwand* obtains, if the mothers of the sons are of the same

† 1925, 91 Ind. Cas. 482.
‡ 1923, 73 Ind. Cas. 577 (Pesh) ; 1925, 91 Ind. Cas. 482.

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family, but if they be of different families, the system of Chundawand obtains.

Rivaj-i-am :

Question 43— Is any regard had to the age of sons, so that (1) the eldest, (2) the youngest would take a greater or less share than his brethren.

Answer—

All Tribes Except as Mentioned Below. No custom obtains among the rural and the respectable families of the towns.

Gujjars of Nandimarg, Avantipura, Kulgam, and Baramulla Tehsils and Sopore. The eldest son gets *Sardari share.* One she-buffalo, and one or two *traks* of land are given to him more than his share.

Zamindars of Tral. In some families in Kashmir, the custom of giving *Sardari* share obtains. The eldest son gets a greater share as among the Mirs of Rajpur, Maliks of Pulwama, and Rainas of Tikan-Bat-Pura.

Shias of Pattan, Sripartapsinghpura Tehsil and Nunar. The eldest son gets the robes, rings, rosary, and the Quran of his father. If the father has failed to perform Nimaz or fast, the eldest son is responsible to expiate the omission.

Rajputs of Deosar and Rajas of Yaripura and Uttarmachipura. The eldest son gets the *Sardari* share.

In the case of Khaliq Rathar versus Jamal† it has been clearly held that even if one of the brothers has inherited some property from his maternal grandfather, he has a full right to succeed to the property left by his natural father in an equal share with his other brothers. Their Lordships in that case observed "The applicants contention is that as the respondent has since inherited some land from his own maternal grandfather, he should not be given any share of the land belonging to Ahad (the father of applicant and respondent) who are related as step brothers to each other. But this is not a valid ground to deprive the respondent of his father's inheritance."

69 The fact that the mother of one set of sons of the prepositus belongs to a higher caste and the mother of the sons by another wife of the same prepositus belongs to a lower caste bears no consideration in the distribution of his estate among his sons who succeed equally as a general rule

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† Decided by the High Court of Judicature on the 9th of Jeth, 1990.

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Illustration.

A dies leaving two widows and five sons. Two sons are from A's eldest widow while the other three are from A's second widow. One of the widows claims heritage to a high caste of *Sayeds* while the other widow comes of a *Najjar* family. A's five children will succeed equally to A's property irrespective of the fact that A's senior widow is from *Sayed* family while his other widow belongs to a lower caste of *Najjars*.

Remarks :— Among all tribes in the valley at the time of contracting a marriage for any individual, caste prejudice plays a very important part in the final settlement of the relation. Kashmiri Pandits and Kashmiri Muslims of urban areas care more for a good *Khandan i. e.* the high status and descent of the family, than for any other matter. It has been observed that people sometimes even don't care to see if the bride or the bridegroom is physically good when the bridegroom or the bride belongs to a high caste (*Khandan*). But once a marriage has been contracted between a woman of a high caste or a woman of a low caste, the sons of the wives succeed equally and at the time of the distribution of the estate of the prepositus no consideration is paid to the fact that one wife claims heritage from a high caste and the other is descended from a lower or a low caste.

Question 42— Is any regard had to the caste or tribe of the mother so that the sons by a wife of a high caste or of the same caste or tribe with the father take larger shares than the sons by the wife of a low caste or of a different caste or tribe ? **Rivaj-i-am :**

Answer—

All Tribes Except as Mentioned Below. No regard is paid to high or low caste of the mother. The sons get aqual shares.

Sayeds of Kulgam. State that if a Sayed marries a Watal woman her issues do not get a heritage.

Gujjars of Kulgam and Nandimarg. If a Gujjar marries a Janjua woman, he is excommunicated from the community and his sons by her do not inherit.

Dunga Hanz of Khanabal. State that children by a wife of low caste get less share than those by a wife of higher caste,

Shias of Nunar and Sripartapsinghpura Tehsils. Follow the Shariat.

Rajas of Baltistan in Tral. The son of a Raja's daughter gets the ancestral Jagir, but the son of a low caste wife gets maintenance only.

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Bomba Rajas of Yaripura and Uttarmachipura They pay regard to high or low caste of mothers. They do not generally follow the Shariat in the matter, although they are Mussalmans by the order of God.

70. As a general rule among all muslim agriculturist classes in the valley the share of a son who predeceases his father descends to his son and the son of such son. Each branch takes *per stripes i. e.*, according to stock, as regards every other branch, but the members of each branch take *per capita* as regards each other. This rule applies equally whether the sons are all by the same wife or by different wives.

Illustration.

'A' dies leaving 'B', 'C' and 'D' as his sons. B predeceases 'A' leaving 'E' as his only son. 'C' also predeceases his father leaving 'F' as his son who also predeceases his grand father 'A' leaving 'G' as his son. On A's death his estate will be divided between 'D', 'E' and 'G' in equal shares, E getting his father's share and 'G' his grand father's.

Remark 1 :— The general principle of Mohommadan Law of inheritance whereby the *nearer in degree excludes the more remote* is not followed in the valley by the muslim agriculturists. According to the custom prevalent among them the principle of *Representation* is generally recognised and if a man be dead his place is taken by his son or if the son be also dead by the grandson and in such a case the son or grandson is in just as good a position as the father or grandfather. But the muslim community living in urban areas generally follow *shariat* in this behalf The application of the custom enuntiated in this article is mostly restricted to the muslim agriculturists living in rural areas.

Remark 2 :— The 'doctrine of representation' is so widely recognised by the agriculturist tribes in the valley that it hardly need be supported by judicial decisions on the point. All revenue authorities attest mutations of the lands in accordance with the principle of inheritance laid down in this article without hunting for any authority on the subject because the agriculturist tribes in the valley are unanimous on the applicability of the doctrine in questions of inheritance pertaining to them.

Remark 3 :— In derogation to the principle enunciated in the second part of this article Pandit Sant Ram Dogra in his Code of Tribal custom in answer to question No. 47 writes that when the estate of a deceased is shared between his own sons and sons of his predeceased sons partition of the estate is

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made per capita and not per stripes. The author of this work has not been able to find a single instance to support this principle nor has in his experience as a judicial officer any such custom been proved before him in any case adjudicated by him. On inquiries made by the author from the common agriculturist in this behalf and on reference to many mutations attested by revenue officers in such cases the author has been convinced of the correctness of the proposition laid down in this article that in the question of partition of the estate of a deceased propositus between heirs who don't stand in the same degree to the deceased each branch takes per stripes (that is, according to the stock) as regards every other branch but the members of each branch take per capita as regards each other.

Rivaj-i-am:

Question 46. When there are male lineal descendants who do not all stand in the same degree of kindred to the deceased, and the persons through whom the more remote are descended from him are dead, will the nearer descendants exclude the more remote ; or are the more remote descendants entitled to succeed simultaneously with the nearer descendants ?

Answer—

All tribes except as noted below. When there are male descendants, who do not stand in the same degree of kindred to the deceased, and the person through whom the remote descendants are connected with the deceased is dead, the remote descendants succeed with the nearer descendants.

All Mussalman Tribes of Anantnag and Bijbehara towns Shias of Pattan, Townspeople of Baramulla and Sopore, other Pakhli tribes of Nunar, and all Mussalman Tribes of Srinagar City. The Shariat is followed in the matter. The remote descendants are excluded from inheritance by the nearer ones, but the remote descendants can only inherit by gift, oral or in writing.

Question 48. Does the inheritance successively devolve upon all male lineal descendants how low so-ever, or is there any degree fixed within which, if there be no male lineal descendants the inheritance will devolve on other relatives ?

If so, state what that degree is ?

Answer :—

All tribes except as mentioned below Other relations do not inherit any property so long as there exists any male lineal descendant of the deceased how low so-ever he may be in the line ; in default of such descendants, agnates inherit.

The Pandits of Srinagar add that if there be no Sapindas, the inheritance goes to the Samanodakas, and in their default to the Sakulas.

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71. Step sons (pichhalags) as a class are not entitled to succeed to the estate of their step-father in the presence of male collaterals even where they have long lived with and been brought up by their step-fathers, or to succeed as collaterals in the family of the step-father but by gift.

Authority :— Sultan Bhat and others versus Rahim and others, appeal No. 11 of 1985, decided on the 22nd of Asuj, 1987 by a Division Bench of the High Court of Judicature.

Rivaj-i-am :

Question 71:— Can the son, by a former marraige, of a woman who contracts a second marriage, inherit from (1) his natural father, (2) his step-father ? If from his step-father, is his share equal to or less than that of step-father's own sons ?

Answer :—

All tribes except as mentioned below. A son by a former marraige of a woman, can only inherit from his natural father, but he may do so from his step-father by gift in writing.

Sunni Zamindars of Kulgam Tehsil differ in saying that the gift can be oral as well, zamindars of Kund, however, adding that gifts need to be oral in the past, but now gifts in writing are coming into vogue.

Mussalmans of Srinagar. The Shariat is followed in the matter. Such a son inherits only from his natural father.

Pandits of all Tehsils, Rajputs of Deosar, and Rajas of Yaripura and Uttarmachipura. No custom.

Question 66 :— When the property devolves on brethren, what if any regard is paid—(1) to unterine descent (2) to association?

Answer—

All Mussalman tribes except as noted below. No regard is paid to uterine descent or to association.

The property devolves upon brethren. Pichchlags (*i.e* step-sons by the same wife but by different husbands) do not inherit.

Gujjars of Nandimarg and Anantnag, and Gakhars of Anantnag. The custom of Chundawand prevails.

The Shariat is followed in the matter.

All Hindu tribes. System of Pagwand prevails.

Bomba Rajas. A Jagir is inherited according to the rules of succession. If a head Jagirdar of the main branch of the agnates dies, his younger brother succeeds him. The system of Pagwand generally prevails when the issues are by wives of the family and tribe but Chundawand is had otherwise recourse to.

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Reference may also be made to question number 41 incorporated completely at page 233 where in the words "Mussalmans of all Tehsils add that Pichhalags or step sons born to a previous husband does not inherit except by gift occur.

Hindus: The custom of remarriage did not formerly obtain among the Hindus of the Valley. But in the year 1934 Hindu Widows Remarraige Act was passed which legalised the remarriage of Hindu widows. After the Act was passed some of the Hindu widows married a second time. But such instances are of women who lost their husbands immediately after their marriage. There is only one instance of a Hindu widow at the present time (Durgi Devi who married one Pandit Arjan Nath) who had married a second time while having children from her first husband. As such no custom obtains at the present time among the Hindus of the valley as to the succession by the son of a wife by her previous husband. This Durgi Devi has also died now.

In the case of Sultan Bhat and others versus Rahim and others† Sawhney J. and Qayoom J. held: "The learned R. M. has rightly pointed out that Sultan Dar, the *pichhalag* son of Sabir Bhat, can have no claim either by law or by custom to the property of Sabir Bhat and that the alleged adoption of Sultan Dar by Sabir Bhat is neither valid nor proved: It has very rightly been remarked that if there had been any truth in this story, then on the demise of Sabir Bhat the whole of the holding would have been mutated in favour of Sultan Dar. Likewise the claim of Ali and Ashmi, son and daughter of Sultan Dar and Mst Mukhti cannot be countenanced as their mother was not a Khana Nashin daughter." R. M's decision upheld.

Gift to Pichhalag.

Remark:— A gift to a *pichhalag* is tantamount to a gift to a stranger, in as much as a *pichhalag* is not entitled to succeed to the estate of his step-father and for the purpose of inheritance he may be described as a stranger to the family of the step father.

A *pichhalag* is at times permitted to be an appointed heir.

71 (a) All heriditary jagirs devolve upon the legitimate son of the deceased Jagirdar. In the event of there being no such son, the jagir shall devolve upon the senior member of the senior branch of the family of the original grantee. In the event of failure of legitimate male issue in the line of the original grantee, the jagir lapses to the state

Explanation:— Among the branches of a family descended

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† Appeal No. 11 of 985, decided on 22nd Asuj, 1987.

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from one ancestor, that descended from any elder son of that ancestor shall be senior to that descended from a younger son of that ancestor.

Authorities :— Revenue Department Notification No. S—52 dated the 20th December 1930 forming apendix to this book Revenue Department notification No. S—58 dated 17/18th April 1931 also forming appendix to this book

Remark 1 :— Para No. (5) of notification No. S—52 of 1930 as cleared by para number (5) of notification No. S—53 of 1931 deal with the rule of succession of jagirdars. It will be noted from these rules that the law of primogeniture governs succession of jagirs and other grants specified in the notifications referred to above. Personal law of the parties and no rule of custom governs the succession of Jagirdars and Mustamaridars.

Remark 2 :— All Jagirs and other grants except those paid to religious institutions have been resumed by the Government with effect from 1st of Baisak, 2005. Refer Article 41 super for a complete discussion on the subject. The rule of succession laid down in this article will therefore be applicable in future very sparingly.

72. In the absence of male lineal descendants and Dukhtari Khana Nashin widow of the deceased ordinarily succeeds to a life estate till remarriage or death which ever falls earlier.

Authority :— Mst. Daryai versus Ali Umar Khan and others, decided by the Revenue Commissioner on the 21st of Bahadoon, 1995, corresponding to the 5th of September, 1938.

Extracts from the Rivaj-i-am.

If a widow with a daughter survives the deceased husband, the whole of the property will devolve upon the daughter, if she is kept at home with her husband (Dukhtar Khana Nashin with Khana Damad). The widow can get only dower on its demand. If a widow survives with the brothers of the deceased or their descendants, the uncles or their descendants, or great uncles or their descendants, *the widow inherits only life interest in the estate till remarriage.* After death of such a widow, the heritage goes to the deceased husband's agnates."†

Among pandits of Srinagar if a man dies without any male issue holding a divided property, *he is succeeded by his widow.* If the deceased leave behind a daughter, she will inherit such property on the death of the widow. Such a daughter is succeeded

† Pandit Sant Ram Dogra's Code of Tribal Custom page 43 in answer to question 48.

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by her descendants. If she has got two or three daughters, the heritage goes to the virgin girl. After the unmarried daughter, the married daughter, provided she be poor; if she be not poor the barren daughter gets the heritage. On the death of daughters their descendants inherit."†

"Among all other Pandits, the property is inherited by the widow and after her come the brothers or the nephews of the deceased. Daughters can get only usual dowery on their marriage."‡

Question 55—What is the nature of a widow's interest where she inherits the estate? What is the extent of her powers of alienation? Rivaj-i-am.

Answer—

All Mussalman Tribes Except as Mentioned Below. Widows inherit only a life interest in the estate of their deceased husband. They can transfer their rights only in favour of their daughters, adopted sons, or Khanadamad, and nobody else.

All Mussalman tribes of Chharat and Sunnis of Shopyan agree with the above custom with reservation that widows cannot adopt.

Townspeople of Sopore, All Mussalman Tribes of Khanabal, Bahats and Dunga Hanz of Baramulla, Pirs, Babas, and Sayeds af Badgam, and Shias of Badgam and Nunar. They follow the Shariat in the matter.

Gujjars of Handwara, Badgam and Nunar, and Bakarwals of Nunar. Widows have no power of aleination.

Other Tribes of Pakali. Widows enjoy usufructuary rights in the estate of their husband with his collaterals within 5 degrees. In absence of such heirs, widows get Sharai share, which they can transfer at their pleasure.

Srinagar Mussalmans. Widows have full powers over their Sharai share as regards its enjoyment and alienation.

Bomba Rajas. A widow inherits for life both movable and immovable property. She can dispose of movable property at her will, but can not alienate the immovable property.

All Sikhs. Widows have usufructuary rights only in the estate of her deceased husband till remarriage. Ornaments of the widow go to the husband's collaterals on her remarriage.

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† Dogra's Code of Tribal Custom page 44, in answer to question No. 49.

‡ Page 44, answer to question number 49, Dogra's Code of Tribal Custom of the valley.

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Widows can alienate only in favour of their adopted sons. Sikhs of Anantnag Tehsil add that widows can not adopt in presence of the husband's brother and alienate to other persons than collaterals.

Sikhs of Badgam differ in saying that widows can alienate a part of their immovable property in favour of their daughters by their deceased husband.

All Pandits Except as Mentioned Below. Widows can alienate their property in favour of their adopted son.

The Pandits of Handwara add daughters and Khandamads to adopted sons as transferees.

Srinagar Pandits. Widows have full powers over their property regulated according to the property *i. e.* if widows have got their husband's property separate from his brother, they can alienate it in any way they please. If the widows have life interest in the property, or their possession be provisional, their powers are regulated by the provisions under which they hold the property.

The widow inherits the following property in Kashmir :—

(1) Istri-Dhan which is the special praperty of a woman. She may dispose of it just as she pleases.

(2) A maintenance allowance, she can use it just as she likes.

(3) If she inherits divided property of her husband, she has powers of alienation. In case she gets undivided share of her husband in the family for life, and agnates of her deceased husband do not provide her with necessaries of life, she can transfer her property.

Nature of a widow's estate.

Remarks :— As to the nature of a widow's life estate under the customary law in the Punjab, it has been held that her estate is limited only if there are reversioners competent to control her acts.† According to the principles of Hindu Law, the restriction on a Hindu widow's powers of alienation are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death.‡ The same rule applies to the case of a widow holding under custom. The nature of a Hindu widow's estate in Kashmir is to be determined by what the evidence before the court proves to be the custom applicable to the parties concerned. If there is not any proof of a customary

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† Refer 9 P. R., 1914.

‡ 1920 I, Lah. 588 ; 1923, 78 Ind. Cas. 717.

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rule, the question is to be decided in accordance with Hindu Law subject to any modification of that law by custom which may be proved. A widow, who in the absence of male issue and in accordance with the almost universal Kashmir agricultural custom succeeds to a life interest in her deceased husband's estate, is entitled to the enjoyment of the whole of the income of the estate and is not bound to account for her expenditure to the possible reversioners.†

Budhists

Among Budhists of Ladakh also a widow also inherits only life interest in the property of her deceased husband and she has no power to alienate it unless there exists a pressing necessity. In the case of a bequest no question of any necessity arises and hence a Budhist widow is unable to bequeath her husband's property. (Refer I, J. & K. Law Reports page 266. Code of Tribal Custom in Ladakh Tehsil prepared by Thakur Singh, Assistant Settlement Officer Ladakh prepared in 1968 relied upon.

Surrender.

A widow can surrender her life estate to the next reversioner and accelerate the latter's estate. But the surrender must be of the whole estate and not merely of a portion of it.‡

Limitation.

Adverse possession of a widow's estate by a trespasser during her life cannot be adverse against a reversioner or bar his claim and limitation begins to run as against such reversioner only from the death of the widow. For a detailed discussion on this point please see Rustomji's Law of Limitation, 4th edition, at page 725.

Presumption that widow takes only life interest.

Where a Mohommadan widow is found enjoying the whole of her husband's property to which she has succeeded on the death of her husband, and it is shown that the widow under the personal law would have succeeded to something much less in extent, the presumption is that she has only succeeded for her life, i. e., she takes only customary life interest.¶

Widows right to transfer.

The right of a widow to transfer her life interest has been considered at length by the Revenue Minister in the case ef Satar son of Sultan versus Razak son of Sadique.‡‡ In that case the Revenue Minister held as follows: "The question is whether the right which she possesses to hold the land till her marriage can be alienated by her. Such a right is certainly alienable under section 6 of the J. & K. Transfer of Property Act being property'

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† 101 P. R. at page 388. ‡ 17 P. R., 1902.

¶ 54 P. R., 1903 at page 219.

‡‡ Decided by the Revenue Minister on the 5th of Bahadoon, 1995.

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No condition attaches against alienability. I refuse to express an opinion as to what happens if and when Mst. Zoni remarries".

Under the customary law a reversioner entitled to an estate on the death of a Hindu or Mohommaden widow has no vested interest and his rights cannot be determined during the life time of the widow. But in order to prevent evidence being destroyed by lapse of time a declaration can be granted to a reversioner that an unauthorised alienation made by a widow shall not be binding upon the reversioner beyond the life time of that widow. There must, however, be an alienation by a widow in fact and in law before any relief can be granted to a reversioner.† Every transaction by which a widow surrenders possession and allows the mutation to take place cannot be regarded as a transfer nor every order of the Revenue Court by which the mutation is effected constitutes in law a transfer Before a transaction can be characterised a transfer, it must assume the form of a will, mortgage, lease, gift or exchange or it must assume a form which in law is recognised and treated as a transfer. (Refer 5. J. & K. law reports page 23 at page 27). But when the nearer reversioners do not challenge the alienation, it is not open to the remote reversioner to challenge it (6, J. & K. Law Reports page 41, A. I. R. 1924 Lahore 656 distingnished and A. I. R. 1931 Lahore 495 referred to) The title of reversioner must depend upon the state of things existing at the limited owner's death and a suit before that time would be an unnecessary and useless litigation of question which may never arise or may arise in a different form. (7, J & K. Law Reports page 82.)

New Legislation.

Under section 12 of the J. & K. Hindu Succession Act of the year 1956 any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her *as full owner thereof and not as a limited owner.* The word "property" as referred to in the section includes both moveable and immoveable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not before, at or after her marriage or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as Stridhan immediately before the commencement of the Act. But nothing contained in the section applies to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument

† 5, J. & K. law Reports 23.

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or the decree, order or award prescribe a restricted estate in such property.

73. If there are two or more widows they succeed jointly.

Hindus : two or more widows.

Remark :— Two or more widows succeeding as co-heirs to the estate of their deceased husband take as *joint tenants* with rights of survivorship and equal beneficial enjoyment. Thus if a Hindu dies leaving two widows A and B, they are entitled as between themselves to an equal share of the income, and on the death of either of them, the other is entitled to the whole of the income by survivorship. Though co-widows take as joint tenants, none of them has a right to enforce an obsolute partition of the estate against the other so as to destroy their right of survivorship. But they are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom, and the court may at suit of any one of them pass a decree for separate possession and enjoyment. Each can deal as she pleases with her own life interest, but she cannot alienate any part of the *corpus* of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime.† But the right of survivorship may be relinquished by agreement between the widows. Such an agreement may be effected orally and without a registered instrument.‡

Rivaq-i-am.

Question 54—If there be several widows, do they take in equal shares? Is any distinction made in respect of the rights of widows who are not of the same family with their deceased husband?

Answer—

All mussalman Tribes and Sikhs Except as Mentioned Below. Widows share equally. No distinction is made regarding the family of widows. Mohommadan widows inherit till remarriage

Bomba Rajas of Yaripura and Uttarmachhipura Widows of the same tribe, inherit equally. If there be a widow of an inferior

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† Refer for an authority 1935, 14 Pat. 518.

‡ 1911, 34 Mad. 72, 7 I. C. 858.

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tribe, she cannot inherit, although she has been lawfully married. She gets only maintenance allowance.

Pirs, Babas and Sayeds of Badgam. Partition is made proportionately to their dowers.

All Pandits Except as Below. Widows share equally, unless they adopt a son for performance of the obsequial cermonies. No distinction in partition regarding castes or families of widows is made.

Srinagar Pandits. If the property be undivided and the brothers of the widows' deceased husband be living associated with him the widows without male issues get maintenance only and live in the joint family. If the agnates do not supply the living of a widow, she can alienate her property.

74. Among all Mussalman tribes in the valley a widow does not retain the estate of her deceased husband on her re-marriage even if she brings her second husband to live at her former husband's house. On her remarriage the estate reverts to the nearest heirs of the husband.

Illustration.

A, a Muslim agriculturist, dies leaving a widow. Mutation of agricultural land belonging to A is made in the name of his widow for life or till re-marriage. The widow marries again but brings her second husband to live with her in her first husband's home. A's collaterals claim the agricultural property belonging to A which was mutated in the name of A's widow for life or till remarriage on A's death. A's collaterals must succeed even though the widow may claim that she continues to live in her former husband's house along with her second husband.

Authority :— Lassa versus Mst. Rahmati, decided by the learned Revenue Commissioner on the 11th of Jeth, 1996, corresponding to the 24th of May, 1938.

Remark :— Ordinarily among all Mussalmans of the valley widow succeeds to a life estate the property of her husband. She loses her all interests in her husbands property the moment she contracts a new marriage. On her remarriage the property of her deceased husband reverts to the next heirs of her deceased husband. In case she brings her husband to live with her in her former husband's house there does not seem to be any instance in which the wife might have been permitted to retain the property of her deceased husband. But Pandit Sant Ram Dogra in his Code of

Dogra's view held wrong:

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Tribal Custom in the valley† writes :— "Among all Mussalman tribes a widow inherits the share of her deceased husband whether she be chaste or unchaste. After remarriage, widows lose their rights in the property of their husbands. If a widow brings a second husband to live with her in her first husband's home, she can retain the share till death. The second husband does not acquire any rights in this property.' This view of the Pandit has been thoroughly discussed by the learned Revenue Commissioner in the case of Lassi (appellant) versus Mst. Rahmati (respondent) ‡ In that case Raja Mohommad Afzal Khan, the then Revenue Commissioner, held : "The wazir-i-wazart in accepting this appeal placed reliance on the answer to question No. 57 in the code of Tribal Custom in the valley drawn up by Sant Ram Dogra. The answer to this question shows that amongst the Muslims of the valley if a widow brings on a second husband to live with her in her first husband's house, she can retain the share till death. The second husband does not acquire any right to this property. Excepting the answer which is given to this question by Sant Ram Dogra in his Code, there is no precedent produced in support of this custom by the respondents, either before me or before any of the subordinate Revenue Officers. *I may make it clear to the Revenue Officers that what has been mentioned in the Code of Tribal Custom in Kashmir by Pandit Sant Ram Dogra is not to be taken as a gospel truth. The Code contains his observations on the enquiry conducted by him and it has got no sanction of law behind it* During the tenure of my office as Governor Kashmir for over three years, I have come across with no case in which a widow has been legally allowed to retain the property of her deceased husband on her remarriage with the man who came to live with her deceased husband's house. In the present case there is evidence on the record to show that Ramzan some times lives with Mst. Rahmati at her house, and some times she goes to his own house. This does not show that Rahman Dar is living permanently at the house of Mst. Rahmati.

Lassi versus Mst. Rahmati cited.

"From the perusal of the wazir-i-wazarat's order in appeal, it appears that at the time when the mutation of the land was sanctioned in the name of Mst. Rahmati on the death of Rahim it was stipulated that she could retain possession of it till her remarriage. In the presence of this stipulation, it was incumbent on the subordinate revenue officers to have cancelled the name of Mst. Rahmati from the body of the record of right on her marriage. The proper time for her to protest against this condition was when it was imposed by the order of the Revenue

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† Pandit Sant Ram Dogra in his Code of Tribal Custom in the valley page 49, in answer to question number 59.

‡ Decided on the 11th Jeth, 1995, corresponding to the 24th May, 1938.

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Officer on the death of Karim. After having kept quite for a number of years after the sanction of the mutation, I am afraid, she can't be allowed to retain this land on her remarriage. Under these cicrumstances I accept this appeal."

75. Among all agricultural tribes in the valley in the existence of a male lineal descendant of the deceased his wife is ordinarily only entitled to suitable maintenance, whether such descendant is the issue of the surviving widow or of another wife.

Explanation 1 :— Such a maintenance is a charge against the whole or part of the husband's estate and is enforceable against the heir in possession or those claiming under him.

Explanation 2 :— The widows' right of maintenance is not dependant on her residence in the family of her deceased husband.

Explanation 3 :— But, the charge of widows' claim of maintenance cannot be enforced against a *bonafide* purchaser without such notice, unless fixed and charged by decree of Court or contract on particular property.

Refer answer to qst. No. 40 of Pandit Sant Ram Dogra's Code of Tribal Custom incorporated at pages 106 and 107 of this book with special reference to the words : ".....If the widow be childless and she has sons of her husband by another wife she gets *mahar* only, and some times a plot of land for maintenance till remarriage" given in the answer.

Rivaj-i-am

Question 51 :— What is the rule of division between widows with sons and widows without sons ?

Answer :—

All Mussalman Tribes Except as Noted Below. Widows without sons get dower or a plot of land for life till remarriage. Widows have no power of alienation.

Gujjars of Avantipur Tehsil. In case of there being no land a widow is given a she-buffalo for maintenance.

Gujjars of Nandimarg, and Rajputs of deosar. Among them women enjoy a separate share. Partition among sonless widows is equally made.

Gujjars, Sikhs, and Watals of Achchabal, and Pandits and Bomba Rajas of Uttarmachhipura. No custom regarding widows share ; only sons inherit.

All Mussalman Tribes of Khanabal Follow the Shariat in the matter.

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Sunnis and Shias of Pattan, and Sunnis and Watals of Sri-Partapsingpura Tehsil. If there be any dispute among widows and sons, a widow or widows take equal shares with sons. Several alienations have been accordingly made.

Gujjars of Pattan. Among them a sonless widow can get only Mahar.

Gujjars of Handwara, Shahar khas and Sripratapsingpura Tehsil. No share of the landed property is given to widows, and they are maintained if they live at home ; if they go away, they take their dower with them,

Townspeople of Sopore. If a widow wishes to go out of home, she gets one-eighth of the property of the deceased and her Mahar. The widow with sons, has usu-fructuary rights at home ; but if she remarries, she gets usual Sharai share.

Shias of Sripratapsinghpura Tehsil and Shahar khas. A widow cannot inherit landed property ; she can get only maintenance. Sons inherit immovable property.

Other Tribes of Pakhli. Widow can get only usu-fructuary rights in the estate. If a widow remarries outside her first home. she can retain the property of her deceased husband, if bequeathed to her.

Sunni Mussalmans and Shias of Srinagar. Follow the Shariat in the matter.

All Sikhs. A widow without sons gets her share equally with her husband's sons by other wife.

All Pandits. Widows with sons or with daughters never inherit. They are entitled to maintenance only. Those who perform the obsequial rites of the deceased as their parents, inherit.

The Pandits of Srinagar add that a sonless widow is entitled to maintenance only.

76. **The mere fact that the husband was joint in estate with others, does not ordinarily deprive the widow of her right to succeed to his share.**

Explanation :—Among Muslim agriculturists when a widow is permitted to succeed to her husband's share in a joint estate she can, ordinarily, claim partition of such share.

Remark :— A widow cannot secure the full enjoyment of her rights unless she be authorised to claim partition of the estate which is joint with her husband's brothers. Ordinarily a Hindu widow holding life estate in her deceased husband's property can not initiate partition of the joint holdings but when any one of the co-shares or co-owners initiates partition the widow is entitled

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to have her full share in the property. The customary law of the country does not recognise this principle to exist among Muslim agriculturist which restricts the powers of the widow to secure the full enjoyment of the estate inherited by her from her deceased husband.

Rivaj-i-am.

Question 56 :— Is there any distinction in the rights of widows based upon the circumstances whether the husband were or were not associated with his brotheren ?

Answer—

All Mussalman Tribes Except as Noted Below. No distinction is made in Kashmir. The widow inherits her deceased husband's property till remarriage, she gets her dower (which is rare). Widows among Bomba Rajas inherit only movable property.

Shias of Khanabal, Badgam and Nunar, and Townspeople of Baramulla. The Mohammadan Law is followed.

Other Tribes of Pakhli. Widows can have usu-fructuary rights in the property in presence of the collaterals of the deceased within 5 degrees.

In absence of the heirs, a widow holds her Sharai share with the Sharai heirs. No distinction as pointed out in the question is made.

All Hindu Tribes. No distinction is made when widows inherit.

77. On the death of the several co-widows the surviving widows take by right of survivorship provided that any of the surviving widows has not caused a forfeiture of her share by remarriage or otherwise.

Remark :— When the last male owner dies without issue, but leaving several widows, they succeed, contrary to the rule of Mohommodan Law, to the whole of his estate for an interest terminable with their lives and with a right of survivorship as between themselves. In some parts of the state adjoining Punjab in the Jammu province where Punjab customs have had a predominant influence on the people if one of the surviving widows remarries with one of the brothers of her deceased husband she does not lose her life interest over her first husbands property jointly held by her with the other widows of her deceased husband. This custom is not, however, recognised in the valley in any sections of the agricultural tribes and on remarriage a widow loses her right over her deceased husband's property. The marriage with a brother of the deceased husband by a widow is known as a *karewa* form of marriage.

78. **A widow inherits the share of her deceased husband**

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whether she be chaste or unchaste

Exception:— Among all Gujjars, and Rajas of Yaripura and Uttarmachhipura an unchaste woman does not retain her inheritance. She is paid off her Mahar only.

Question 57 :— What is the effect of unchastity upon the right of a widow in respect of the estate of her deceased husband? In the case of the widows who are not Hindus, what is the effect of their remarriage? Rivaj-i-am

Answer—

All Mussalman Tribes Except as Noted Below. A widow inherits the share of her deceased husband whether she be chaste or unchaste. After remarriage, widows lose their rights in the property of their husband. If a widow brings a second husband to live with her first husband's home, she can retain the share till death. The second husband does not acquire any rights in this property.

All Gujjars. An unchaste widow gets no heritage. Her share is forfeited to the agnates. She is not given even Mahar. She can get her dower on remarriage only.

Mussalmans of Kulgam Tehsil. A widow remarrying and bringing home a second husband loses all her rights in her previous husband's property.

Gujjars, Dhunds, Awans, etc., of Baramulla, and Gujjars of Handwara. They pay widows their Mahar, if they turn out unchaste; but they are deprived of their heritage. They cannot hold the property of their previous husband on their remarriage except when they bring a second husband to their first husband's home.

Rajas of Yaripura and Uttarmachhipura. An unchaste widow cannot retain her heritage. She is paid off her Mahar only.

All Sikhs. Follow the Shariat.

Other Pakhli Tribes of Nunar. An unchaste widow is deprived of her share.

Gujjars and Bakkerwals of Nunar add to the above custom that unchaste widows are certainly turned out of doors.

All Hindus Except as Above and Below. Remarriage of widows is not customary. If a woman turns out adulterous, she cannot retain her rights of inheritance of her husband's property. She is excommunicated.

Pandits of Handwara. An unchaste widow continues to hold her own property, provided that she does not waste it away. If such a widow lives in a joint family, she is maintained for life.

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79. The Shias of the valley follow Shariat in the matter of succession of chaste and unchaste widows.

"All Shias follow the *Shariat* in matters of succession of chaste and unchaste widows".†

80. (a) On failure of male lineal descendants, Dukhtari Khana Nishin and widows, the mother of the deceased and his son's widow succeed to a life interest equally with rights of survivorship till remarriage or death whichever falls earlier

Remark :— By the custom obtaining in the valley the mother succeeds to a life estate as the widow of her deceased son's father, whom she would have succeeded if there had been no son to stop or postpone her succession. She succeeds in preference to the male collaterals of her deceased son. But if the mother has married again she is excluded by the male collaterals of her son from inheritance.

Rivaj-i-am.

Question 52— If there is no widow, will the mother or son's widow succeed in preference to collaterals ?

Answer—

see page 22 ante

All Mussalmans Except as Mentioned Below. In absence of the widow, they share equally till remarriage. On remarriage or death, their inheritance goes to the agnates.

All Mussalman Tribes of Khanabal, Baramulla Town, and Srinagar. Follow the Shariat. Widows can be allowed to hold the property with the consent of the agnates.

Bomba Rajas of Uttarmachipura, Sunnis and Pandits of Badgam. No custom.

Other Tribes of Pakhli. The mother and the son's widow do not succeed to the property before the collaterals, though they can retain the property for their life till remarriage ; but they have got no power of alienation.

All Sikhs, Rajputs of Deosar, Rajas of Yaripura, Pandits of Khanabal and Sopore, and all Mussalman Tribes of Nunar. If there remains the mother of the deceased or the sons widow, they succeed in preference to collaterals

All Pandits. Inheritance depends upon Kriya-karam The agnate who performs the obsequial rites of the deceased as his son, succeeds before the mother or the widow of the deceased. The heir is responsible for their maintenance. If they perform the obsequil rites themselves, they succeed in preference to collaterals

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† Dogra's Code of Tribal Custom page 50, in answer to question No. 57.

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Question 53—What is the rule of division as between mother and son's widow ? Rivaj-i-am

Answer—

All Tribes Except as Noted Below. Both of them get equal shares, and have usu-fructuary rights till remarriage.

Gujjars of Nandimarg, Sunni Mussalmans of Kulgam, Gujjars Watals, and Sikhs of Anantnag, Watals and Gujjars of Pattan, Watals of Baramulla, Bomba Rajas, all Tribes of Badgam, and Gujjars of Nunar. No custom.

Sunni Mussalmans of Sopore, Shias of Pattan, and Townspeople of Baramulla. The Shariat is followed in the matter.

Question 65—When the estate devolves upon the mother of the deceased, what is the nature of interest she acquires ?

Define her power of alienation ? On the death of the mother will the property devolve on the heirs of the son, or on her heirs ?

Answer—

All Mussalman Tribes and Sikhs Except as Noted Below. A mother can hold the property till remarriage or death. She has the right of alienation. On her death the property devolves upon the heirs of her son and not upon her paternal heirs.

Zamindars of Chharat add that she can alienate the property to a stranger, if the agnates agree; otherwise not.

Sunni Mussalmans of Khanabal. The heritage held by a mother may devolve upon her paternal heirs, if there be no collaterals of the son surviving.

Gujjars of Pattan. The paternal heirs of a mother are entitled only to a portion of her dower.

Shias of Pattan. When the mother of the deceased son holds the property she can alienate it if there be no collaterals of her sons. She can hold the Sharai share for life, if there be Sharai sharers to her deceased son.

Rajas of Yaripura and Uttarmachhipura. A mother can dispose of her movable property but not the immovable one (except in a gift to her son's agnate, in which her rights are vested only for life. On her death the property goes to her son's agnates, and not to her paternal heirs.

Srinagar Mussalmans. A mother has every power of disposition of her own Sharai share. She can alienate it, and on her death her paternal heirs inherit it.

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All Pandits Except as Noted Below. Succession to the heritage hinges on the performance of Kriya Karam. The mother has no right to succeed. Some one is certainly brought home to be the adopted son of the deceased and he naturally becomes an heir to him. The mother is entitled to maintenance only as long as she lives and holds the property for life. She has got no power of alienation except to an adopted son.

If there be no adopted son, the agnates of her husband succeed to the heritage. The heirs on her father's side do not inherit it.

Pandits of Srinagar and Rajputs of Deosar make a reservation that such mothers can alienate the property in case of urgent necessity.

80. (b) An unchaste woman, among Hindus of the valley, is not entitled to inherit to her husband. But once the husband's estate has vested in her, it cannot be divested by subsequent unchastity.

Authority :— P. L. R., 1935, J. & K. section page 52 at pages 53 and 54.

Remark :— The custom laid down in this behalf by Pandit Sant Ram Dogra is not in conformity with the rule of law as laid down by the Honourable High Court in this behalf. The law followed by the Hindus in the valley is their personal law as is modified by custom. Under the Hindu law when an estate has been vested in a widow, the estate cannot be divested by reason of her subsequent unchastity. The writer of the work has not come across any decision of courts in Kashmir in which the point might have been considered at some length.

High Court view on the point.

In the case of Mst. Gujari versns Biloo and others.† Mr. Justice Sawhney and Mr. Justice Abdul Qayoom held : "We know that Sir D. F. Mulla in his well known book on the principles of Hindu Law in chapter regarding exclusion from inheritance and partition states regarding unchastity as follows :—A widow who is unchaste at the time of her husband's death is not entitled to inherit him, but once the husband's estate is vested in her which would only be if she was chaste at the time of her husband's death, it cannot be divested by a subsequent unchastiy. Sir H. S. Gour in his Hindu Code third edition page 1283 paragraph 2925 states :—'The rule equally applicable to all is that whatever may be the effect of unchastity as a disqualification for

† P. L. R., 1935 J. & K. section page 52, at pages 53 and 54.

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inheritance, it is no ground for divesting any estate after it has once become invested in her. In other words, while the unchastity may be a good ground for exclusion from inheritance, it is no ground for disinheritance. The learned Vakil for the respondent has drawn our attention to two extracts, one from Parasara and the other from Yajnavalkya quoted on pages 584 and 585 of the Hindu Law of Gopal Chandra Sirkar Sastri, 6th edition, and to an observation made by the author that these texts were not before the courts in the unchastity cases and that they show that unchastity becomes very grave if followed by conception and that then a widow's right to her husband's estate must cease. In the first text there is an admonition that if a widow becomes pregnant by a paramour she should be carried to the territory of a different King and abandoned there. In the second extract Yajnavalkya notes that a woman guilty of adultery is purified by *Catamenia*; but her abandonment is ordained in case of conception by adultery, and in case of causing abortion or killing the husband as well as in case of committing heinous sins We have adopted the translation of the author of the book. There is nothing in the extracts from the Yajnavalkya to show that this paragraph refers to a widow who has succeeded to her husband's estate We will not discuss the general principle of Hindu Law regarding this aspect of the matter So far as the first extract is concerned we find that this has been fully considered in the Calcutta case quoted above.

Mitakshara law on the point.

"If Lala Kanwar Sain, Judge High Court, has been rightly understood when he has laid down a proposition of law in direct opposition to the above view which has been approved by the Privy Council, we refuse to follow and respectfully dissent from him. In our opinion under Hindu Law, i e., Mitakshara an estate vested in the widow cannot be divested by her subsequent unchastity. We, therefore, allow this appeal, set aside the decree passed and dimiss the plaintiffs suit but leave the parties to bear their costs throughout."

Rivaj-i-am.

"Among all Hindus remarriage is not customary. If a woman turns out adulterous she cannot retain her right of inheritance of her husband's property. She is excommunicated. Among Pandits of Handwara an unchaste widow continues to hold her own property, provided that she does not waste it away. If such a widow lives in a joint family, she is maintained for life.‡

Where a Hindu widow who has been unchaste, was proved to have given up the life of unchastity, held that she was en-

‡ Pandit Sant Ram Dogra's Code of Tribal Custon in answer to question number 51 quoted on page 248 of this book.

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titled to bare maintenance.†

81. By remarriage a widow will not be deprived of any future rights of inheritance to which she would have been entitled but for such remarriage.

Explanation :— A Hindu widow does not lose her right of inheritance from her son by the first husband simply because she has remarried.

Illustration

A widow remarries after the death of her first husband. Sometime after, her son by her former husband dies issueless and without leaving any widow. Under custom she can succeed to the estate inherited by her son from his father, her first husband.

Remark 1 :— The principle of customary law enuntiated in this article is based on the natural ties of human relation by blood or otherwise which remain inseparable from an individual even after his assumed or adopted positions in life for the satisfaction of his social, economic or biological needs. By marriage a woman is transferred from her parental stock to the family of her husband. But the natural ties of relationship by which she is bound with her brothers or other paternal relatioos don't cease to exist even though she has been transformed from one family into another as a result of her marriage.

Remark 2 :— Before the passing of the Hindu Widows Remarriage Act in the State, the question of a Hindu widow to succeed to her son by the first husband after her remarriage did not at all arise. No case pertaining to the Hindus of the valley, on the point is available even now, because even after the passing of the Hindu Widow's Remarriage Act, the widows (Hindu) don't ordinary marry a second time and it is only such widow's who are hard pressed by circumstances that they remarry. A Hindu widow possessing children seldom marries a second time.

Case Law: In the case of Puran Chand versus Mst. Viran‡ Mr Justice Abdul Qayoom and Mr. Justice Kichlu held as below:—"The only point to determine in this appeal is as to whether a Hindu widow who has remarried can succeed to the estate of her first husband. The learned District Judge Jammu has held that the

† 1924, 49 Bom. 459 (authorities discussed).

‡ 41, P. L. R., 1939, J. & K. section page 122.

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widow can succeed. In this appeal no authority has been shown that the mere fact of remarriage will deprive a Hindu widow of succeeding to her son's estate. On the other hand 1924 Bombay 360 ; 1929 Bom. 91 (Full Bench) and 1924 Nagpur 328, support the view taken by the learned District Judge."

82. The Assami holdings mutated in the name of the deceased as a son-in-law of one wife do not descend to the sons of the deceased by another wife.

Illustration

A, a Muslim agriculturist, has two wives B and C. B's father dies without any male lineal descendant. His Assami holdings are mutated in the name of his sons-in-law in equal shares. A's children, born of C, cannot claim inheritance to the Assami holding which A got from his father-in-law through B, *viz.* B's father.

Authorities :

Authority :— Abdulla and others versus Gulam Mohommad and another decided by the High Court of Judicature on the 25th of Bahadoon, 1989.

In the case of *Abdulla versus Gulam Mohommad,*† Dalal C. J., and Qayoom J. held as under :—"The parties are the sons of one Habib. The respondents are the sons of Habib by one wife Mst. Khurshi and the applicant by another wife Sajada Bibi. The property in suit is the Assami holding, which orginally belonged to Mst. Khurshi's father and Habib's name was entered as son-in-law of Mukhta Mir, the father of Mst. Khurshi.

"On the death of Mukhta Mir the holding of Mukhta Mir was mutated in four equal shares among his sons-in law. The assami rights should descend to Mst. Khurshi's sons and not the son of Mst. Sajada Bibi.

"There is no specific custom proved on behalf of the applicants that the property of Mst. Khurshi's father should descend to Habib."

83. Among Muslim agriculturists in the valley, an unmarried daughter succeeds to the agricultural land of her father and retains the inheritance till she is married out of the family.

Explanation :— When an unmarried daughter succeeds to the estate of her father, she cannot be subsequently forced by any one to marry if she does not want to be married.

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† Decided on the 25th of Bahadoon, 1989.

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Illustration.

A, a Muslim agriculturist, dies leaving two daughters B and C. B is married out of home. C is unmarried. C will succeed to the agricultural land of which A was the owner till her marriage. On her marriage the property shall revert to the collaterals of her deceased father.

Authorities :— Mst. Jani versus Jallo and others, decided by P. C. Mogha, Revenue Minister on the 29th of July, 1939, corresponding to the 14th of Sawan, 1996 ; Mst. Mukhti versus Aziz and others, decided by the Revenue Minister on the 17th of Har, 1996, corresponding to the 1st of July, 1939 ; Afzal Khan Revenue Commissioner in Jamal Dar versus Fazi, decided on the 28th of Sawan, 1995, corresponding to the 12th of August, 1938 ; Satar versus Razak, decided by the Revenue Minister on the 20th of August, 1938, corresponding to the 5th of Bahadoon, 1998.

Case law referred

In the case of Mst. Jani daughter of Jamal Bhat versus Jallo and others, P. C. Mogha, the then Revenue Minister held that under the customary law of the land unmarried daughters inherit their father's property only until their marriage and as the petitioner has admittedly married and she has lost her right.†

In the case of Satar, son of Sultan Ahangar of Tehsil Awantipora versus Razak, son of Sadique Lohar,‡ Mr. Lal Gopal Mukerjee, the then Revenue Minister held : "Mst. Zooni's name is shown in the record as being entitled to possession till her remarriage. She is said to be about 25 years but she has refused to remarry. Nobody can force her to marry against her will. The question is whether the right which she possesses to hold the land till her remarriage can be alienated by her. Such a right is certainly alienable under section 6 of the Transfer of Property Act, being 'property'. No condition attaches against alienability. I refuse to express my opinion as to what would happen if and when Mst. Zooni after transferring her interest to the extent allowed by law would prevent Satar from acquiring the rights."

84. Among Mohommadans of the valley, a married daughter does not succeed to the agricultural land of her father in preference to her father's collaterals unless she be a Khana

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† Decided by the learned Revenue Minister on the 29th of July, 1939, corresponding to the 14th of Sawan, 1999.

‡ Decided by the Revenue Minister on the 20th of August, 1938, corresponding to the 5th of Bahadoon, 1999.

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Nashin daughter (Dukhtari Khana Nashin with a Khana Damad)

Authorities:— Mala Bibi versus Taja Bibi, reported as 1937, P. L. R., J. & K section page 149; Aziz versus Gani and others, reported as 1936, P. L. R., J & K section page 86; Rasool Sofi versus Mst. Asha Bibi, reported as 1936, P. L. R, J & K. section page 104; Mst. Khatuni versus Ahmad Bhat, civil second appeal number 201 of 1934, decided by a Division Bench of the High Court on the 17th of Har, 1988.

Khatuni versus Ahmad Bhat referred:

In the case of Mst. Khatuni versus Ahmad Bhat,† Dalal C J. and Qayoom J. held: "...It is well established that in the Kashmir province the Mohommadan Law does not govern the right of inheritance of Mohommadans but such law as modified by custom governs those relations. Under the Mohommadan Law a daughter is an heir to a father's estate, but she is not such an heir in the Kashmir Province with respect to agricultural land, unless she is a Khana Nashin daughter of her father. *As Mst. Khatuni is not found to be a Khana Nashin daughter, under the customary law she is not an heir to the property in dispute.*"

For a detailed discussion on the point refer chapter on Dukhtari Khana Nashin. Also please refer questions numbers 49 and 58 of the Rivaj-i-am compiled by Pt. Sant Ram Dogra. Question number 49 and its answer has been completely incorporated in this book at page 107 and 108 *supra* while question number 58 has been incorporated at page 58.

85. No distinction regarding kind of property (moveable or immoveable, ancestral or self acquired) of their father is made when daughters inherit like sons with their husbands kept at their home for them.

If daughters are married outside, and not kept at home they receive a share of the moveable proprety according to the Shariat.

Remarks:— Khana Nashin daughters acquire the status of sons for the purposes of inheritance of their fathers' share. Refer previous articles of this Digest *ante*.

Rivaj-i-am referred.

"Among all Mussalmans of the valley and Sikhs with the exception of certain tribes (which Mr. Dogra specifies in answer to question No. 59) no distinction regarding kind of property is made when daughters inherit, which they generally do, when they reside with their father. But daughters married outside, and not

† Civil 2nd appeal No. 201 of 1934, decided on 17th Har, 1988.

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kept at home, receive a share of the moveable property according to the Shariat among the Pattan Zamindars,' † Refer pages 107 and 108 *supra* of this book for a complete reference of the question and its answer.

86. Among Muslim agriculturists in the valley, the share of a daughter who is not a Duktari-Khana Nishin is not increased by the fact of her residence with her father. No difference is made regarding her share in the circumstances that the daughter is married and barren widowed and without male issue, or a mother of daughters only.

Rivaj-i-am referred.

Among the Mussalmans of Srinagar, the share of a daughter not being a Dukhtari-Khana Nashin is not increased by the fact of her residence with her father. A daughter gets her Sharai share of her heritage on her fathers' decease. No difference is made regarding her S h a r a i share in case she is married and barren or widowed and without male issue or a mother of daughters only.‡

The writer of the present book has been unable to find out any decided case on the point.

Rivaj-i-am :

Question 61.— If a married daughter with her husband live with the father up to his decease, can the daughter inherit ?

Can daughters who are married and barren or widowed and without male issues, or mothers of daughters only inherit the father's estate.

Answer—

All Tribes Except as *Noted Below.* A married daughter inherits her fathers' property in the circumstances mentioned in the question, but among all Pandits and Sikhs of Badgam, daughters do not inherit, but by gift whether they may be married, barren widowed, with male or female issues.

Gujjars of Kund and Nandimarg, Gujjars and Bakkerwals of Nunar. A daughter inherits by gift, but she cannot claim a share by mere residence with her father.

Other Tribes of Pakhli A daughter has usu-fructuary rights only. She can get only the share alloted to her by gift. She cannot inherit in presence of agnates upto 5 degrees.

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† Pandit Sant Ram Dogra's Code of Tribal Custom page 51, in answer to question No. 59.

‡ Pandit Sant Ram Dogra's Code of Tribal Custom page 52, in answer to question number 61.

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Srinagar Mussalmans. The share of a daughter is not increased by the fact of her residence with her father. A daughter gets her Sharai share of the heritage on her father's decease. No difference is made regarding her Sharai share in the circumstances noted in the question.

Pandits of Srinagar. Daughters do not inherit by residence with their father. Unmarried daughters inherit with their brothers. They can claim performance of their marriage ceremonies of their after marriage gifts.

N. B.—All the expenses of a marriage and the subsequent ceremonies are the first charge upon the property of their father.

87. Before the passing of the Hindu Succession Act of 1956 among all the Pandits of Srinagar, in default of a son son's son, a son's grandson or a widow, a daughter would succeed to the divided property of her father next after a widow. If the estate was joint, only unmarried daughter would succeed to the undivided share of their father till their marriage.

Authorities :— Mst. Tekri, widow of Vishna Koul and Mst. Janki widow of Prakash Ram of Rainawari versus Sona, decided by the Revenue Minister on the 21st of Sawan, 1995 ; Gopi Nath and Janki Nath versus Mst. Sati Mali, decided by the Revenue Minister on the 21st of July, 1934, corresponding to the 6th of Sawan, 1991.

Case law referred in detail.

In the case of Mst. Tekri, widow of Vishna Koul and Mst Janki, widow of Prakash Ram of Rainawari versus Sona, son of Rishi Bhat and others.† Lal Gopal Mukerjee, the then Revenue Minister held ; "As regards the law of succession, we have to refer to Pandit Sant Ram's book. The question has been put in No. 49 and an answer is to be found at page 44. As regards Pandits not residing in Srinagar it is stated that properties are inherited by the widow and after her go to collaterals and that daughters get only the usual dowery on their marriage. In Srinagar. however, it is definitely laid down that the widow succeeds and then the daughter's sons, that is to say the succession goes more or less according to the Hindu Law under the Mitakshara system.

"The parties at the present day, at any rate, reside in Srinagar. But it is said that Gulab Ram resided in village Lalpur where the property is situated and succession to him must be governed by the custom prevailing outside Srinagar.

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† Revenue appeal No 12 of S. 1994 decided on 21st Sawan, 1995.

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"I do not think I need go into the complicated question of right of succession. It is clear that *prima facie* under the Hindu Law and the custom in Srinagar, the daughters ought to succeed unless a custom to the contrary is proved. The parties are shown as residents of Srinagar. The mere fact that in the village papers Mst. Teja Mali was recorded as *'Sakin Deh'* is not conclusive. The right of inheritance, therefore, may be in the daughters. But the crucial point is that they have been found to be in possession. It would, therefore, be for the collaterals to go to civil court to obtain a decision as to their title, if one exists in them."

Gopi Nath versus Mst Sati Mali.

In another case, Gopi Nath and Janki Nath sons of the late Chandra Joo of Chinkral Mohalla Srinagar, versus Mst. Sati Mali daughter of Narain Pandit,† V. N. Mehta, the then Revenue Minister, held: "According to the Rivaj-i-am of Kashmir published by Government the reply to question 58 is as follows :—

"When a man dies leaving no male issue but the widow and daughter, then the daughter inherits after the death of the widow if the share is a divided share.

"In the particular case before me there is evidence on record that this was self acquired property of the father of Mst. Sati Mali. In these circumstances the decision is plain. It is according to custom. I fail to see how I can interfere with in a revision application. The mother is agreeable to give up her life interest in favour of the daughter.".

"Among Pandits of Srinagar, if a man dies without a male issue, holding a divided property, he is succeeded by his widow. If the deceased leave behind a daughter, she will inherit such property on the death of the widow. Such a daughter is succeeded by her descendants. If she has got two or three daughters the heritage goes to the virgin girl After the unmarried daughter, the heritage goes to the married daughter, provided she be poor ; if she be not poor, the barren daughter gets the heritage On the death of daughters their descendants inherit. In default of issues to the daughters, the property reverts to the agnates of the original proprietor"‡ "Among Srinagar Pandits daughters can never inherit their ancestral property, if the estate is joint."¶

Limited estate

Before the passing of the Hindu Succession Act of 1958 the daughter would take a limited interest in the estate of her

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† Decided on 21st July, 1934, corresponding to 6th Sawan, 1991.
‡ Pandit Sant Ram Dogra's Code of Tribal Custom in answer to question No. 49 incorporated at pages 107 and 108 of this book.
¶ Pandit Dogra's Code of Tribal Custom question 59.

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father corresponding to the widow's estate. On her death, the estate would pass not to her heirs, but to the next heirs of her father. The next heirs of the father are called the reversioners. Per Mr. Justice J. N. Wazir and Mr. Justice K. L. Kichlu in the case of Amar Nath and another versus Mst. Janki and four others :† "... ..It is clear that under the Mitakshara school of Hindu Law by which the parties are governed, a Hindu inheriting from her father, takes a life estate only with reversion at her death to his heirs. An unmarried daughter of course excludes the married daughters, but on her death the married daughters succeed. As the alleged custom has not been proved, Mst. Bhga Kei was certainly not competent to make a bequest in favour of her husband's nephew of the property which she had inherited from her father....."

Priority among daughters.

Daughters would not inherit until all the widows were dead. As between daughters, the inheritance would go first, to the unmarried daughters, next to daughters who were married but 'unprovided for,' i. e., indigent, and lastly, to daughters who are married and unriched, possessed of means. A married daughter might be a widow. No member of the second class could inherit while any member of the first class was in existence, and no member of the third class could inherit while any member of the first or the second class was in existence.‡

Survivorship.

Two or more daughters of a class would take the estate jointly, as in the case of widows, with rights of survivorship. Any one daughter could alienate her life interest in the property, but not so as to effect the rights of survivorship of the other daughters. And, like widows, daughters could enter into any agreement regarding their respective rights in their father's estate provided such agreement did not prejudice the rights of reversioners. They could divide the estate merely with a view to convenient enjoyment, retaining the right of the survivor to take the whole on the death of one of them, or they could agree that the right of survivorship should be extinguished as between themselves. The agreement may be affected orally and without a registered writing ¶

Unchastity of a daughter is no ground for exclusion from inheritance, except where there is an unmarried daughter who is a prostitute and a married daughter who is chaste. The latter succeeds in preference to the former. It may, therefore, be ob-

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† Reported as P. L. R., 1937 J. & K. section page 58.

‡ For authorities refer Mulla's Hindu Law, 8th edition page 38.

¶ For the respective authorities please refer Mulla's Hindu Law, 8th edition page 38.

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served that under the Mitakshara law, a widow is the only female who is excluded from inheritance by reason of unchastity.

The daughter takes a limited interest in the estate of her father corresponding to the widow's estate. On her death, the estate passes not to her heirs, but to the next heirs of her father. The next heirs of the father are called the reversioners.

88. Before passing of the Hindu Succession Act of 1956 among all the Pandits of the valley, the fact that a daughter was married and barren or widowed and without male issue or mother of daughters only or after marriage had come to live at her father's house did not entitle her to claim inheritance of her father's property.

Authority :— Mst. Ganga Mali versus Kunga Mali, reported as 41 P. L. R., J. & K. section (1939) page 77.

Extracts from the Rivaj-i-am

Pandit Sant Ram Dogra in his Code of Tribal Custom in the valley in answer to question number 61 on page 52 writes: "Among Pandits of Srinagar daughters do not inherit by their residence with their father. Unmarried daughters inherit with their brothers. They can claim performance of marriage ceremonies and their after marriage gifts." (For a complete reference of the questian with its answer refer chapter on "Marriage"

In the case of Mst. Ganga Mali versus Kunga Mali,† the High Court of Kashmir has in very clear words held that if a daughter comes to live with her father after she becomes a widow she cannot claim any right of inheritance to her father simply because she resides with her father. In that particular case one of the sisters, who had become a widow and was brought by her father to live with him during his life time, claimed the entire property of her deceased father exclusive to her other sisters on the ground that she was a Khana Nashin daughter of her father. The court held that she was not a Khana Nashin daughter of her father but had, subsequent to the death of her husband, come to live with her father in her father's home; and as such she could not claim the property of her father to the exclusion of her other sisters who had an equal right to their father's property. The mere fact that one of the daughters had been living with her father for some reason does not entitle her to claim inheritance of her father to the exclusion of other heirs. Nor does the long stay entitle her to claim a share larger than that of her other sisters.

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† Reported as 41 P. L. R., J. & K. section (1939) page 77.

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89. A daughter cannot be the legal heir of an occupancy tenant. If she is in possession she can at best be a tenant at will.

Authority :— Fateh Lon son of Rasool Lon versus Mst. Khonami, decided by the Revenue Minister on the 29th of July, 1939, corresponding to the 14th of Sawan, 1996

Authority referred.

In the case of Fateh Lon versus Mst. Khonami daughter of Ahmad Mir decided on the 29th of July, 1939, corresponding to the 14th of Sawan, 1995, P. C. Mogha, the then Revenue Minister, held : "In my opinion under section 67 of the J. & K Tenancy Regulation a daughter is not legal heir of an occupancy tenant. If she is in possession, her status is that of a tenant at will. She cannot get occupancy rights and should not have been entered as an occupancy tenant."

90. Among all Mussalman Tribes in the valley, after daughters their sons and daughters succeed to the property. Only such daughters inherit equally with their brothers for whom husbands have been brought home.

Explanation :— The shares of daughter's sons are proportioned to the number of daughters who inherited the property.

Illustration

(1) A, a Muslim agriculturist living in the valley, dies leaving two daughters B and C. B has one son D. C has two sons E and F. B is married at home by A (*i. e.*, a husband is brought home for B by A in his life time). A dies. C is married out of home. A's property will devolve on B. After B's death the property will devolve on B's son D. If B predeceases A, A's property will devole upon A's collaterals.

(2) A, a Muslim agriculturist, dies leaving two daughters B and C. Both the daughters are Khana Nashin daughters of their father. B and C will equally succeed to the property of A. On B's death the share she inherited from her father will devolve upon her children. The number of children of the daughters is immaterial.

Remark 1 :— The wordings used in the Rivaj-i-am after daughters their sons and daughters succeeed to their property' clearly indicate that the sons and daughters of daughters succeed only to the property of the daughters in whom the property of the owener has vested, *i. e.*, the sons of daughters succeed to the property of their mother and not to that of their maternal grandfather.

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Remark 2 :— Among Muslim agricultural tribes living in the valley, a daughter's son is not recognised as an heir of his maternal grandfather, except in succession to his mother. This remark runs counter to the principle of Hindu law on the subject and the position of the daughter's son of a Muslim agriculturist under the Kashmir custom appears to be diametrically opposed to his position under the Hindu Law. Among Muslim agriculturists, daughter's sons are nowhere recognised as having any independent rights.

The relevant portion of the Rivaj-i-am drawn up by Pt. Sant Ram Dogra records that 'among all Mussalman tribes with a few exceptions after daughters their sons and daughters succeed to their property. The shares are proportioned to the number of daughters who inherited the property orginally. Only those daughters inherit for whom sons-in-law are brought home."†

For a detailed discussion on the subject refer chaptar on Dukhtari Khana Nashin *ante.*

Rivaj i-am

Question 63 :— After daughters do daughter's sons succeed ? If so, is the property equally divided amongst all the sons of several daughters, or are the shares proportioned to the number of daughters who leave sons?

Answer—

All Mussalman Tribes Except as Noted Below. After daughters their sons and daughters succeed to their property. The shares are proportioned to the number of daughters, who inherited the property originally. Only those daughters inherit for whom a son-in-law is brought home.

Gujjras of Achchabal and Nunar, Rajas of Yaripura and Uttarmachipura, and Rajputs of Deosar. Daughters do not inherit.

Watals and Sikhs of Achchabal. No custom.

Sopore Mussalmans. Follow the Mohommadan Law.

Other Pakhli Tribes. The Sharai share of a daughter goes to the issues, but not the share set apart for them by usage (*i e* a share given for maintenance). The latter share reverts to the agnates of the daughter's father.

All Hindu Tribes Except as Mentioned Above. Daughter's sons inherit, in case any heritage is held by daughter. Sons' shares are computed according to the number of daughters, whose issues they are. No regard is paid to daughters with sons or without sons.

91. Among all Pandits of Srinagar, after daughters the sons

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† Answer to question number 63, Dogra's Code of Tribal Custom.

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of daughters succeed to the property of the last male owener. Hindu law is followed by the Pandits of Srinagar in this behalf

Explanation :— In the presence of daughters, the sons of daughters have no right to succeed to the property of their maternal grandfather

Illustration

A, a Kashmiri Pandit living in Srinagar, dies leaving two daughters B and C. B has two sons. C has only one son. **B** predeceases A. On A's death his property will devolve on his daughter C. After C's death the property will devolve upon B's two sons and C's one son in equal shares.

Authorty:— Ganga Mali versus Kunga Mali reported 1939 P. L. R, J. & K. section page 77.

When entitled to succeed :— The daughter's son is not entitled to succeed if there be any daughter living and capable of inheriting.‡ A daughter's son is strictly a bandhu or bhinna gotra sapinda, being related to the deceased through a female, but he inherits with gotraja sapindas, by virtue of express text of Hindu Law in this respect. He succeeds not as an heir to his mother but an heir to his own maternal grand-father.

A daughter's son takes as a full owner :— The daughter's son takes the estate as full owner like any other male heir, and on his death the succession passes to his heirs and not to the heirs of his maternal grandfather.

The daughter's son occupies a peculiar position in the Hindu law. He is a *bhinna gotra sapinda* or *bandha,* but he comes in before parents and other more remote *gotraja sapindas.* The reason is that according to the old practice it was competent to a Hindu who had no son to appoint a daughter to raise up an issue to him. Such a daughter, no doubt, was the lawful wife of her husband, but her son, called *Putrika Putra,* became the son of her father. Such a son was equal to an *Aurasa* or legtimate son, and took his rank, according to authorities, as the highest among the secondary sons. Although the practice of appointing a daughter to raise up an issue for her father became absolute, the daughter's son continued to occupy the place that was asigned to him in the order of inheritance and even now he takes a place

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‡ Ganga Mali versus Kunga Mali reported as 1939 P. L. R. J. & K. section page 77.

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practically next after the male issue, the widow and the daughters being simply interposed during their respective lives. The difference in his position under the old law and the present law is that under the former he became by a fiction of law a member of his maternal grandfather's family, while under the present law he is a member of his own father's family, but is also regarded a son's son to his maternal grandfather for purposes of inheritance. "In regard to the obsequies of ancestors," say the Mitakashara, "daughter's sons are considered as son's son.

Extracts from the Rivaj-i-am

Pandit Sant Ram Dogra in his Code of Tribal Custom in the valley on page 54 in answer to question number 63 writes: "Among all the Hindu Tribes in the valley, daughter's sons inherit, in case any heritage is held by daughter. Son's shares are computed according to the number of daughters, whose issue they are. No regard is paid to daughters with sons or without sons."

92. Among all the Mussalman Tribes in the valley sisters are usually excluded by agnates however distant as well as their issues.

Authority :— Mst. Zooni and others versus Salam and others 11 J. & K. Law Report page 79.

Remark :— The usual custom among the Muslim agriculturists in the valley is that females are excluded by agnatic relations. But there is an exception to this general rule. Daughters succeed if they are kept at home and husbands are brought into the family for them. There is no custom to the effect that if a husband be brought into the family by a brother for his sister, she is entitled to succeed as a *Hamshera Khana Nashin* to the estate of her brother. Even in the case of daughter's who have been kept at home as Khana Nashin daughters their sons don't succeed to the estate of their maternal uncles through their mother.‡ So a sister or a sister's issue cannot by custom succeed to the property of her brother to the exclusion of her brother's male collaterals.

Para 92 of the Digest only means that sisters and their issues are usually excluded by agnates, however distant and not that a sister is not an heir at all even in the absence of any agnate. There is not any general custom in favour of sister's succession to the exclusion of collaterals as regards any kind of immoveable property, whether ancestral or non-ancestral. In the Punjab also a sister, under custom, has scarcely any right of succession but their sons have succeeded in some cases in preference

‡ Refer previous articles of this Digest.

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to the proprietory body or to government. It seems to be in consonance with ordinary ideas of right that they should succeed in preference to mere strangers. The general custom in the valley is that sisters are usually excluded from succession and so are their issues.

Per Hon'ble Pt. Shiam Krishan Dar in Mst. Zooni and other versus Salam and others (XI J. & K. Law Reports page 79) : "A well recognised custom prevails in the valley by which daughters are excluded from the inheritance of their father's estate unless they are made 'Khana Nashin'. And it seems highly anamolous that the daughters after being excluded from succession to their father's estate should be allowed to take the possession of the same estate after it has descended to their brother in their capacity as sisters."

Question 69—Does the property ever devolve upon sisters or upon sister's sons ? If upon sisters' sons, how are their shares computed? Rivaj-i-am:

Answer :—

All tribes except as noted below. Daughters' if kept at home together with their husband share equally with their brothers. Daughters' sons inherit their mothers' share.

All Mussalman tribes of Khanabal and Pattan, Townspeople of Baramulla and Sopore, Pirs, Babas, Sayeds, Shias and Mussalmanas of Badgam. They follow the Shariat in the matter

Bomba Rajas and Rajputs of Deosar. Daughters do never inherit.

Gujjars and Bakkerwals of Nunar Daughters do not inherit even if they remain at home. In default of agnates only, they can succeed to the property. 'Agnates' is said to mean grandfather's descendants in the male line.

Other tribes of Pakhli. Sisters do not share upto the 5th degree, they mean that sisters do not get Sharai share in presence of the brothers, the uncles, the uncle's sons, the great uncle, and the grandfather. In absence of these agnates they get the Sharai share and have every power of its disposition.

Pandits of all Tehsils and Sikhs of Handwara and Badgam. Sisters do not inherit but by gift.

93. Under the provisions of section 2 of the Hindu Law of inheritance (amendment) Act of 1997, among the pandits of Srinagar a son's daughter, daughter's daughter sister and sister's son are entitled, in the order so specified, to rank in order of succession next after a father's father and before a father's Brother. But these provisions have now been superseded by the enorcement of the Hindu succession Act of 1956 incorporated in this book as an appendix.

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Authority :— Section 2, Hindu Law of Inheritance Amendment Act of 1997; corresponding to Hindu Law of Inheritance Amendment Act of 1929 in British India.

Old law.

Before the passing of the Hindu Law of Inheritance Amendment Act of 1997, corresponding to the Hindu Law of Inheritance Amendment Act of 1929 in British India, a son's daughter, daughter's daughter, sister and sister's son were nowhere recognised as heirs in order of succession under the Hindu Law. A son's daughter, daughter's daughter, sister and a sister's son were recognised as heirs in Bombay and Madras only, as *Bandus*.

In the State, before the passing of the Hindu Law of Inheritance (Amendment) Act of 1997, the right of inheritance of a sister was considered at a great length in the case of Mst. Vishri versus Dama Pandit ‡ In that case the learned Judges of the High Court of Judicature held as under :—

Vishri versus Dama Pandit:

"The other point urged by the appellants learned counsel is that even if the gift made by Mst. Saraswati in favour of her daughter Mst. Vishri be considered as imperative, Mst. Vishri could still lay claim to the property in dispute, as she is the daughter of Jewan Ram. But as has been stated above the present dispute is in regard to the inheritance of Tara Chand and not of his father Jewan Ram. On the death of Jewan Ram the property was inherited by Tara Chand, his only son, and Tara Chand then became the full owner of the property. So, whatever claim Mst. Vishri could now put forward in regard to Tara Chand's property can only be as a sister of Tara Chand and not as daughter of Jewan Ram. And as sister, Mst. Vishri can have no right as against Tara Chand's collaterals. It was held by His Highness the Maharaja Bahadur¶ in Mst. Vishri versus Vasa Ram and others that a sister has no right of succession either under custom or under the Hindu Law when there are male collaterals connected through males in existence. In the face of this clear and definite law on the point no further discussion is necessary."

The position of these heirs in order of succession was clearly determined by the passing of the Hindu Law of Inheritance (Amendment Act of 1997). Section 2 of the Act reads as under :—

A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother.

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‡ Reported 41 P. L. R., J. & K. section page 35.

¶ In his order dated the 8th of December, 1934.

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"Provided that a sister's son shall not include the son adopted after the sister's death."

From the perusal of the Act it will be clear that the provisions of this Act don't in any way affect any special, family or local custom having the force of law. But since the Pandit's of Srinagar follow Hindu Law on the point, they shall be governed by the provisions of this regulation.

It has been observed by the Madras High Court that this legislation is defective in that it does not bring in son's daughter's son, daughter's son's son, daughter's daughter's son in section 2 and place them somewhere before sister's son. A preference for one's own descendants to collaterals is in consonance not only with Indian sentiment but with most systems of law.‡ Madras view.

94. Illegitimate children are not entitled to any share in their putative father's estate, but they can in some cases claim maintenance until they are able to earn their own living, subject to good behaviour. Their descendants, however, can assert no such claim as of right.

Authority :— Durshan Pandit versus Mst. Janki decided by His Highness the Maharaja Bahadur on the 4th of September, 1936.

In the case of Darshan Pandit versus Mst. Janki¶ it was held :— "It was secondly for very valid reasons that the Revenue Minister has held that Darshan Pandit is not related to Perma Nand or Isher Dass. When he is not related and is not a brother as is claimed by him he has not any standing to sue. He cannot discuss the question of Janki's right, when he himself has no right whatsoever to the property either of Isher Dass or of Perma Nand. As pointed out by the Revenue Minister Darshan Pandit's name was never entered as a successor in interest of Goverdhan, father of Isher Dass and Perma Nand. It is evident that Darshan Pandit was not the son of Gowardhan Pandit. Possibly the guess made by the Revenue Minister is correct that *Darshan Pandit was illegitimate son of* Gowerdhan and lived in the family. There is no reason to interfere by way of revision and the application is hereby dismissed as advised by the Revenue Minister."

Remark 1:— Where a marriage has taken place between parties whose marriage, either by reason of relation-ship, or previous marriage, or difference of caste, or any other ground,

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‡ (1935), 58 Mad. 238 ; 135 I. C. 107, (1934) A. M. 611.

¶ Decided by His Highness on —9—1936.

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was not permissible, the off spring of such a marriage is considered illegitimate. The paternity of a child among Mohommadans can only be established by marriage between its parents. The marriage may be valid *Sahib*, or irrigular *fasid*, but it must not be void *batil*. When the paternity of a child is not established its legitimacy also cannot be established.

Hindu law on the point referred :

Remark 2 :— According to the Hindu Law an illegitimate son of a Sudra is entitled to inherit the property of his putative father, provided that his mother was in the continuous and exclusive keeping of his father, and he was not the fruit of an adulterous or an incestuous intercourse.† But among the three regenerate classes an illegitimate son is not an heir to his natural father either under Hindu Law or under the Customary Law.‡

According to the Mohommadan Law a son born out of wedlock becomes legitimate and entitled to all the rights of a son born of a lawful marriage by subsequent acknowledgement, provided his parentage is not otherwise established, there was no legal impediment to the marriage of his parents and it is not obvious that there was no marriage between his parents.¶ It is doubtful, however, if a similar effect will be given to an acknowledgement amongst agriculturists, though if the father had a customary power of alienation and exercises it in favour of his illegitimate son, the latter would be permitted to take the estate by virtue thereof. Acknowledgement of paternity under the Mohommadan Law is a recognition not simply of sonship, but of legitimacy as a son. It is quite different from adoption.‡‡

Rivaj-i-am

Question 78—What are the rights of illegitimate children ?

Answer—

All Tribes Except as Mentioned Below. Illegitimate children do not inherit.

Sunni Mussalmans of Kulgam go further in saying that they are not maintained, even by the husband, whose wife or daughter brings forth such children.

Bomba Rajas, Gujjars of Achhabal, Rajas of Yaripura, and Pandits of Kulgam. No custom.

Rajputs of Deosar. Chhatroras get maintenance till they serve the family.

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† Refer 1920, 48 Cal. 643 where the authorities have been very elaborately reviewed.

‡ 15 P. R. 1914.

¶ I. L. R. XLVI Cal. 545

‡‡ Please refer for a detailed discussion on the subject Mr. Amir Ali's Handbook of Mohommadan Law, pp. 77, 80.

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Principle of Representation:

95. By virtue of the right of representation whereby descendants in different degrees from a common ancestor succeed to the share which their immediate ancestor, if alive, would succeed to, and which presumably prevails amongst agriculturists, all collateral heirs succeed together and not to the exclusion of each other, whether they were associated with, or separated from the deceased. But the right of collaterals to succeed is not a single indivisible right so as to give each collateral a right of action for the whole estate. Each collateral is entitled to his own share.

Principle of representation is inapplicable where parties are governed by their personal law and not by custom.

The principle of representation is not recognised either by Mohommadan or Hindu Law, and cannot therefore be applied to cases where the parties are admittedly governed by their personal law and not by custom. Under the strict Hindu Law a son, a grandson whose father and grandfather are both dead, all succeed to separate property of their paternal ancestor. The reason is that the grandson represents the rights of his father to a share and the great grandson represents the rights of his father and grandfather. This is the only case to which the doctrine of representation applies under the Hindu Law. It does not apply to any other case.† The rule of representation is not, therefore, in any way applicable to the collaterals under the strict Hindu law. But according to the custom prevailing in the agriculturist classes in the valley, the rule of representation is recognised to the fullest extent, and the collaterals succeed together and not to the exclusion of one another.

Extracts from the Rivaj-i-am:

Pandit Sant Ram Dogra in his Code of Tribal Custom in the valley‡ writes: "Where there are male descendants, who do not stand in the same degree of kindred to the deceased, and the person through whom the remote descendants are connected with the deceased is dead, the remote descendants succeed with the near descendants." To this the Pandit mentions an exception. He writes that all the Mussalman Tribes of Anant Nagh and Bijibehra Towns, Shias of Pattan. Towns people of Baramulla and Sopore and other Pakhli Tribes of Nunar, and all Mussalman Tribes of Srinagar city follow Shariat in the matter. The remote descendants are excluded from inheritance by the nearer ones, but the remote descendants can only inherit by *gift*, oral or in writing. For a complete reference to this question with its complete answer refer page 237 *supra*.

Exceptions.

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† Mulla's Hindu Law page 21,

‡ On page 42, in answer to question number 46.

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Remark :— A collateral does not lose his right as against the proprietors of the village merely because he owns no land in the village and resides elsewhere.†

96. In the case of collateral succession, in a contest between relations of the whole blood and those of the half blood the court may presume, until the contrary is proved, that—

(*a*) When the property of the common ancestor was distributed according to the rule of *Chundavand* (per stripes), the whole blood excludes the half blood ; and

(*b*) Where the property of the common ancestor was distributed according to the rule of *Pagvand* (per capita) the whole blood succeed together

But where the brothers of the whole blood subsequently form separate groups and so regulate succession amongst themselves as to alter the original rule of distribution (e. g , from *Pagvand* to *Chundavand*.) the presumption arising from the original rule of distribution will cease to operate.

Rivaj-i-am extract

Pandit Sant Ram Dogra in his Code of Tribal Custom in the valley on Page 42, in answer to question 47 writes : "Among all Tribes in the valley division of the estate among the collaterals is made with certain exception (which are noted in answer to the same question) in accordance with the rule of *Pagvand* (per capita) and not in accordance with the rule of *Chundavand* (per stripes), but among the Rajputes of Deosar and among all the Mughals of Kadipura and Gukhhars of Karewa the rule of *Chundavand* prevails. In some cases as for example in the case of Sunni Mussalmans and Shias of Srinagar, a grandson can get inheritance by *Tamlik* or gift only, and no custom of *Pagvand* or *Chundavand* amongst them prevails. The shares in those cases are assigned according to Shariat " Refer page 235 *supra.*

Remark :— The preference accorded by the Hindu Law to the whole blood over the half blood is confined to brothers and nephews, and does not extend to descendants of the same grandfather and higher ancestors.‡

97. Among all the Tribes in the valley if a person voluntarily retires from the world and becomes a member of

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† No. 110 P, R. 1905 F. B ; 1923 4 Lah. 392.

‡ See Sarkar's Hindu Law, 5th edition page 425, and also Mulla's Hiudu Law where the question is discussed elaborately and the authorities cited.

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a religious order, he can retain his property ancestral or acquired. The property which he would have inherited if he had not retired from the world, devolves upon him. If he wants to give the property to his disciples he can.

Exception 1 :— The Mussalmans of Srinagar follow the Shariat and say that the heritage of such a person retired from the world goes only to his Sharai heirs. If a gift is made by such a recluse in favour of a disciple the objections raised by the heirs are futile.

Exception 2 :— The Sunni Mussalmans of Nunar say that a person retired from the world cannot hold his property. It is held by his heirs and all heritage falling on the recluse goes to them. He can make a gift of the property acquired by him after his retirement to his *Chela*

Exception 3 :— Among all the Pandits of Srinagar if a person has not made a gift of his property to anybody before he retires from the world, he can hold the property just as ever. His legal heirs succeed him. In default of his legal heirs, his *Chelas* inherit his property acquired during the period of the hermitage.

Exception 4 :— Among Rajputs of Deosar if a man becomes a *Sadhu* and remains at home, he can retain his property but if he goes out of home, he cannot hold the property and cannot get the heritage. If he becomes at *Sanyasi*, he cannot inherit or retain his property.

Remark 1 :— Under the strict Hindu Law where a person enters into a religious order renouncing all worldly affairs, it is tantamount to civil death, and it excludes him altogether from inheritance. (Refer Mulla's Hindu Law for a detailed discussion on the point). But under the custom prevalent in the valley a person can usually retain his property subject to the restriction that his legal heirs succeed to him after his death and not his *chelas* ; even the *chelas* succeed to him in case he has got no legal heirs to succeed to him.

Remark 2 :— A person who becomes *Tarak-ul-Dunya*† does not lose his interest in the property which he is entitled to inherit in a normal course. By becoming so he of his own voluntary act merely renounces the world and does not renounce his right to any interest in any property which belongs to him or might fall to his share in future under any rule of succession.

Remark 3 :— A person does not become a *Sanyasi* by merely

† A person who voluntarily renounces the world.

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declaring himself a *Sanyasi* or by wearing clothes ordinarily worn by *Sanyasis*. He must perform the ceremonies necessary for entering the class of *Sanyasis* and without such ceremonies he cannot become dead to the world. A division bench of the Kashmir High Court in the case of *Tara Chand Chaudri versus Sham Lal Bayu*† has held : "The law in this behalf has been laid down with sufficient clarity in Mulla's Hindu Law where it is stated that a person does not become a *Sanyasi* by merely declaring himself a *Sanyasi* or by wearing clothes ordinarily worn by *Sanyasi*. He must perform the ceremonies necessary for entering the class of *Sanyasis* ; without such ceremonies he cannot become dead to the world. This proposition is affirmed in a ruling of their Lordship of the Allahabad High Court contained in Baldev Prashad V Arya Priti Nidhi Sahha and others, 52 Allahabad 789, I. L. R. In that case their Lordships remarked that the postulant has to perform certain essential ceremonies including *Prajapathiyesh* and *Vira ja homam*, There lordship quoted the observations of Srinivasa Aiyangar J. in *Kondol Row V Swanulavaru and others* (40 Indian cases 535) 'Then he had to perform *Prajapathiyeshti* or *Agneshti* and finally *Virajahomam*. These are sacrifices in fire and are purificatory ceremonies. At the end of the ceremonies the postulant has no property at all, for even the sacrificial vessels if they are of wood must be burnt in the fire and if they are of metal must be given to the priest'. Their Lordships then remarked. 'He then takes leave of his sons and standing in water utters a *mantara* three times to the effect that he has given up his desire for sons wealth, world and everything. He does not become a *Sanyasi* till the *mantara* is pronounced. This procedure is stated to be common to all *Sanyasis*. In the Madrass case referred to above (Reported in A. I. R. 1918 Mad. 402) the question of the relinquishment by the postulant was discussed at length in the light of original texts and it was held that proof of the performance of these ceremonies is of the essence in considering the question whether a certain person has renounced the world in terms contemplated in the Hindu Law. Their Lordships went on to remark. "The essence of such *Sanyasam*, as the word itself imports is the relinquishment of all property and worldly concerns even of the desire for them. In the Taithireva Upanished, it is said : 'not by words not by sons, not by wealth, but by relinquishing these some obtained immortality ; getting out of the desire for sons, for wealth, and the world a *Brahmin* goes into mendicant state. It was emphasized 'The rituals to be followed by a person desirous of becoming a *Sanyasi* are indicated in the *Smitis* and are set out in detail in the works of the commentators and text book writers." Reference to these text books writers is given and it is remarked that without the performance of these cere-

† I J & K Law Reports 308, I. L. R., 52 Allahabad referred.

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monies it could not be assumed that a man has renounced the world."

Question No. 74 of Pandit Sant Ram Dogra's Code of Tribal Custom in the valley, and answer to the question reads as under :-

Rivaj-i-am :

Question 74— If a person voluntarily retires from the world and becomes a member of a religious order what is the effect upon (i) his right to retain his property, (ii) his right to acquire property by inheritance ?

Upon whom will devolve property which he would have inherited if he had not retired from the world ?

Answer—

All Mussalman Tribes Except as Noted Below. If a person voluntarily retires from the world and becomes a member of a religious order, he can retain his property ancestral or acquired. The property which he would have inherited, if he had not retired from the world, devolves upon him. If he wants to give the property to his disciple, he cannot do so.

He can make a gift of his acquired property to his Khalifa but the immovable property should devolve on his heirs.

Rajas of Yaripura and Uttarmachipura, Watals of Handwara, Gujjars and Shias of Sopore. No custom.

Srinagar Mussalmans. Follow the Shariat and say that the heritage of such a person retired from the world goes only to his Sharai heirs. If a gift is made by such a recluse in favour of a disciple, the objection raised by the heirs are futile.

Sunni Mussalmans of Nunar A person retired from the world cannot hold his property. It is held by his heirs and all heritage falling on the recluse, goes to them. He can make a gift of the property acquired by him after his retirement to his *chela.*

All Hindu Tribes Except as Noted Belaw. A recluse cannot retain possession of his property, nor does a heritage devolve upon him. If he has some money, he can spend it in charity.

Hindus and Sikhs of Achabal No person in their Illaka has become a Sanyasi They become Brahmacharis generally and consequently they can inherit and retain their property.

Pandits of Pattan. Both *chelas* and son share equally if they perform obsequial rites.

Pandits of Badgam. If a *Sadhu* is sonless, he can transfer his property ; if he has sons, he can only alienate the acquired property.

Pandits of Srinagar. If a person has not made a gift of

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his property to any body before he retired from the world, he can hold the property just as ever. His legal heirs succeed him. In default of his legal heirs, his *chelas* inherit his property acquired during the period of the hermitage

Rajputs of Deosar. If a man becomes a Sadhu and remains at home, he can retain his property ; but if he goes out of home, he cannot hold the property and cannot get the heritage. If he becomes a Sanyasi, he cannot inherit or retain his property.

98. Generally among all the Mussalmans of the valley (agricultural classes) if the owner dies leaving no lineal descendants the agnates of the last male owner inherit the property. But the estate is inherited by them when all the heirs of the deceased with only limited interest in the property have lost their such interest in the property.

Exception :— Pandit Sant Ram Dogra in his Code of Tribal Custom in the valley† writes : "In case a man dies leaving no lineal descendants, among the Sunni Mussalmans of Khanabal, Shias of Pattan, towns people of Sopore and Srinagar Musslmans follow Shariat in such cases."

Authorities :— Ahad Lon son of Rasul Lon versus Mst. Taji decided by P. C. Mogha, Revenue Minister, on the 29th of July, 1939, corresponding to the 14th of Sawan, 1996 ; Subhana and Mahada versus Ahmad and others decided by the Revenue Commissioner on the 21st of Sawan, 1995, corresponding to the 5th of August, 1938 ; Jamal Dar versus Mst. Farzi, decided by the Revenue Commissioner on the 28th of Sawan, 1995, corresponding to the 12th of August, 1938.

Rivaj-i-am : *Question 64*—When a man dies leaving no lineal descendants, and no widow, on whom will the inheritance devolve ?

Answer—

All Tribes Except as Below. The agnates of the deceased person inherit.

Sunni Mussalmans of Khanabal, Shias of Pattan, Townspeople of Sopore, and Srinagar Mussalmans. The Shariat is followed.

All Pandits. The person, who performs Kriya-Karam of the deceased as his son inherits. If there be no agnates of the deceased, the Prohat of the deceased inherits his property (but it is very rare).

Rajputs of Deosar. In default of agnates, a man of the

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† On page 54 in answer to question number 64.

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same tribe with the deceased and closely related to him, inherits his property.

'Agnate' explained

A person who is related to the owner through a common ancestor without the intervention of one or more females, is called an 'agnate' of the owner. Agnates are persons whose relationship to the deceased can be traced without the intervention of females Among the Gujjars and Bakarvalas of Nunar, as mentioned by Pandit Sant Ram Dogra in his Code of Tribal Custom in the valley, on page 57 'agnates' are meant to be grandfather's descendants in the male line For a detailed explanation of the word refer page 132 *supra* bearing discussion under para 25 of this book.

99 Among all the Mussalman Tribes of the valley, in the absence of the widow, the mother and son's widow share the estate of the deceased owner equally till their remarriage or death. On their death or remarriage the estate passes to the collaterals of the deceased. Among all the Sikhs, Rajputs of Deosar and Pandits of Khanabal and Sopore the mother of the deceased or the son's widow succeed in preference to the collaterals.

Rivaj-i-am :

Refer Pandit Sant Ram Dogra's Code of Tribal Custom page 46, in answer to question number 52, incorporated in this book at page 252.

Remark.

A mother or a son's widow succeed to the usufractuary interest of the deceased owner's estate. They lose their right of inheritance on their remarriage and the estate wholly devolves upon the collaterals of the deceased.

100. If a person dies leaving no heir, his property usually escheats to the crown.

Authorities :— Ahad Bat and others of Aribal versus State. decided by the Revenue Minister on the 6th of July, 1934.

In the case of Ahad Bhat and another versus State, V. N. Mehta esq., held as under :—

"The owner dying without heir, the estate has become part of the *Shamilat* of the Bhayachara village. In these circumstances I fail to see where the claim lies against the State. If the party is dissatisfied with the order all it can do is to go to Civil Court, prove that the last owner did not die without heirs and if he satisfactorily proves his case, he will get back this area which has been made over to the *Shamilat* of the village."

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Lawaris Holding

The inheritance of the holding of a *lavald* are envisaged in Ailan No. 23 promulgated by His Highness on 12th Har, 1985. The Ailan has been reproduced in Standing Order No. 23 of the Revenue Department rule 63, which is in English. The marginal note appended to this rule is "LAWARIS HOLDING" and sub rules 1, 2 and 3 of this Ailan run as follows :—

1) The heirs of an owner, Malguzar, Assami are those recognised by law or custom ; the heirs of an occupancy tenant are those specified in sections 67 and 68 of the Tenency Regulation (No. 11 of 1980).

2) The share of any owner, Malguzar, Assami or occupancy tenant holding directly under the State in a joint holding who die without heirs, shall devolve upon the surviving shareholders in that holding in accordance with their share.

3) The land of any owner, Malguzar, Assami in a *Baichara* estate, who dies heirless, shall become *Shami-lat-i-Deh* and not *Galwand* ; for the purpose of this rule a Bhaichara estate includes all estates in which possession is the measure of right whether the tenure therein is that of owner Malguzar or Assami.

It will be noted that in this rule the equivalent of *Lavalad* (issueless) is not used as it appears in the urdu version of the Ailan. It uses the expression "without heirs" and as has been held by the Board of Judicial Advisors in a ruling reported as 9 J. & K. Law Reports page 172, is undoubtedly more in accord with the intention underlying the Ailan which was an act of grace to commemorate the happy occasion of his coronation and it could not have been the intention of His Highness to deprive any one who, but for the Ailan, would have been entitled to inherit.

In Rassia and others versus Lachuu Dass and others reported as 9 J. & K. Law Reports page 171. "S" was an owner in the land along with other co-shares. "S" died in 1973 leaving his widow "N". Land was mutated in the name of "N". Later on in the year 1982 land was mutated in the name of "R" as adopted son of "S". The widow "N" olso died in 1988 and "R" continued in possession of the land after her death. Other co-shares of "S" sued "R" in Samvat 2000 claiming title to escheat of S under Ailan No 23 dated 12th Har 1985. It was held by the Board of Judicial advisors that the co-sharers were bound to prove that "S" died not only without leaving any issue but further that he left no heir under the Hindu Law so that a case of escheat could arise on the death of his widow "N".

101. As a general rule there does not exist any custom under which a father can in his life time nominate a particular son

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as the fit person to take a larger share than his brothern after the father's decease. There are however certain exceptions to this which have been incorporated in answer to the relevant question of the Rivaj-i-am.

Rivaj-i-am :

Question 44—Can a father in his lifetime nominate a particular son as the fit person to take a larger share than his brothern after the father's decease ?

Answer :—

All Tribes Except as Below. No custom.

Gujjars of Tral, Kund-Nandimarg and Nunar, Sunni Mussalmans and Watals of Achchabal, Shias of Pattan, Sikhs and Pandits of Baramulla and Sripartapsinghpura Tehsils, and Bakerwals of Nunar.

A father can nominate a particular son to take a larger share than his brothers in his own lifetime or after death. Sunni Mussalmans and Watals of Anantnag and Bijbehara say that verbal gifts or nomination of a particular son to take a larger share is not acted upon.

Pandits of Anantnag, and Bijbehara Towns, Nunar and Srinagar City. A father can nominate a particular son to take a larger share honestly and it is valid only in that case. He can make a disposition of his acquired property but not that of his ancestral property.

Sunni Mussalmans of Baramulla. A father may make shares of his son smaller or larger in his lifetime, but after his death the whole of the property is equally partitioned.

Pirs, Babas, and Sayeds of Badgam, Shias, Sunni Mussalmans and Watals of Nunar. Follow the Shariat in the matter.

Other Pakhli Tribes of Nunar. An indefinite will made by the father is not executed.

Shias and Sunnis of Srinagar. A father is at liberty to bequeath any portion upto one-third of his property to any of his sons, but bequest made beyond this portion is considered to be void. He can make a gift to any person during his lifetime and in sound health.

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SUCCESSION AS GOVERNED BY THE HINDU SUCCESSION ACT OF 1956.

The articles herein after mentioned in this chapter gives the *Hindus* to when the provisions of the Hindu Succession Act of 1956 are applicable. The reader should not mistake that the pronouncements of law as contained in these articles have a binding force because they have the sanction of well recognised custom prevailing in Kashmir. On the contrary the authority of these articles are the provisions of the Hindu Succession Act itself which have been referred to in detail in the articles very clearly.

Devolution in co-parcenary property

When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the Property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

Provided that, if the deceased had left him surviving a female relative specified in clause I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the ease may be, under this Act and not by survivorship.

Explanation 1 :— For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2 :— Nothing contained in the proviso to this section shall be constructed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

Illustrations

(1) A, a male Hindu and his brother B are members of a coparcenary. A dies issueless. B gets the whole property by survivorship.

(2) In (1), A dies leaving a son C, a grandson D of a predeceased son C. Coparcenary property will devolve on C and D by survivorship. D will represent his predeceased father E.

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(3) A and B, two brothers form a coparcenary. A dies leaving behind W, his widow. On his death one half share of A will devolve on W and will not pass to B by survivorship.

(4) In (3), A dies leaving behind W, his widow, S. a son, D, a daughter and M, Mother. A's share on partition immediately before his death will come to one third (B-$\frac{1}{3}$, M-$\frac{1}{3}$ and A-$\frac{1}{3}$. A's one third share will devolve on his heirs and will not pass to B or S by survivorship.

(5) In (4), if A dies leaving behind him not a daughter D but her son, D having predeceased A, A's one third share shall pass by succession to his heirs. The reason is that a male heir claiming through a female heir, both specified in class I of the schedule survives the deceased.

(6) A and B, two brothers, constiute a coparcenary. A had a son, S, who has separated himself in his lifetime. On A's death, his undivided interest shall pass to B by survivorship to the exclusion of S.

(7) In (6) above, A dies surviving him a separated son, S and a daughter D, living with A as a member of the family. A's share will pass by succession to the daughter alone to the exclusion of the son. S's separation from the family will prevent him taking together with D. (Explanation 2).

(8) A and B, two brothers, form a coparcenary. On A's death he is survived by his widow. W, and a married daughter D, who is living with her husband, separate from her father. W will get A's one half share to the exclusion of D (on the assumption that the word 'person' applies to both male and females and not only male. Strictly speaking males are and can be coparceners and the question of separation from the coparcenary can arise in respect of them only.)

(9) A and B, brothers, form a coparcenary. A is survived on his death by a separated grandson, a daughter. a son, living jointly with him as member of the coparcenary. B will not get anything by survivorship as a female heir (daughter) is in existence The Act will regulate to A's share. It shall pass to the son and the daughter in equal shares to the exclusion of the grandson.

Remark :— 1 The broad effect of the provision is that the interest of a coparcener, provided a female relative or a male relative claiming through a female as specified in class I of the schedule survives him, shall devolve by succession and not by survivorship He shall be treated as if he had died intestate and had made a will of his estate in the manner provided by the Act.

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Remark 2 :— The female relatives mentioned in class I of the schedule are : daughter, widow, mother, daughter of a predeceased son, daughter of a predeceased son of a predeceased son and widow of a predeceased son of a predeceased son. These heirs are seven in number. The only male relative claiming through such female relatives is the son of a predeceased daughter.

102. Under Section 6 of the J. & K Hindu Succession Act the property of a male Hindu dying intestate shall devolve according to the provisions of chapter II of the Act (a) firstly upon the heirs, being the relations specified in clause I of the schedule ; (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the schedule ; (c) thirdly, if there is no heir of any of the two classes, then upon the aguates of the deceased ; and (d) lastly if there is no agnate, then upon the cognates of the deceased.

Son ; daughter ; widow ; mother ; son of a predeceased son ; daughter of a predeceased son ; son of a predeceased daughter ; daughter of a predeceased daughter ; widow of a predeceased son ; son of a predeceased son of a predeceased son ; daughter of a predeceased son ; widow of a predeceased son are the heirs specified in class I of the schedule

The heirs included in class I of the schedule are the following :—

I. **Father.**

II. **(1) Son's daughter's son, (2) son's daughter's daughter ; (3) brother ; (4) sister,**

III. **(1) Daugher's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.**

IV. **(1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.**

V. **Father's father, father's mother.**

VI. **Father's widow ; brother's widow.**

VII. **Father's brother ; father's sister.**

VIII. **Mother's father ; mother's mother.**

IX. **Mother's brother : mother's sister.**

Illustration.

(1) 'A', a male Hindu dies leaving a son 'S', a father 'F', a mother 'M' and a daughter 'D',. The son, the mother and the daughter will succeed to 'A's' property to the exclusion of 'F' his

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father who is a class II heir.

(2) A male Hindu dies surving him a brother's grandson and a brother's daughter's son. The brother's grandson who is an agnate will exclude the brother's daughter's son who is a cognate.

Heirs in class I

Remark 1 :— The description of this class of heirs in class I can be more conveniently arranged to give a better idea of the heirs thus : son, daughter, widow ; son or daughter or widow of a predeceased son ; son or daughter of a predeceased daughter ; son or daughter or widow of a predeceased son of a predeceased son ; mother son or daughter of a predeceased daughter of a predeceased daughter are not included The doctrine of representation in regard to daughters or their issue is carried to the second degree only and not to the third degree. The word *widow* includes all the widows together. Between they inherit *per capita.* Similarly, heirs in the branch of each predeceased son or each predeceased daughter inherit *per stripes* as regards son, widow or daughter ; amongst themselves they inherit *per capita.*

Heirs in class II

Remark 2 :—The heirs in class II are divided into 9 enteries. Those in the first shall be preferred to those in the second entry, those in the second entry shall be preferred to those in the 3rd entry. Heirs in any one entry share equally or take simultaneously. It is impossible to rationalize the classification of these heirs in these nine enteries. They don't follow any fixed rule or logic. The lawyer is to take them as they are and determine the rights of each heir in the class. A brother or sister mentioned as heir in the class does not include a brother and sister by uterine blood. The reason is obvious.

Agnates and Cognates.

Remark 3 :— Under Hindu law agnatic relationship was confined to 7 degrees in the male line and five degrees in the female line. Sucession beyond those degrees was a matter of uncertainty and gave rise to conflict of decisions. Here the agnates as a class have been placed above the cognates, excepting the preferential treatment accorded to certain female relations by placing them in class I and II. The order of succession among agnates or cognates is laid down in section 11 of the Act

As provided by section 8 of the Hindu Succession Act the property of an intestate shall be divided among the heirs in class I in accordance with the following rules :-

Rule 1. The intestates widow, or if there are more widows than one, all the widows together shall take one share

Rule 2 The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3. The heirs in the branch of each predeceased

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son or each predeceased daughter of the intestate shall take between them one share.

Rule 4. The distribution of share referred to in Rule 3– (i) among the heirs in the branch of the predeceased son shall be so made that his widow (or widow together) and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion; (ii) among the heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.

Illustrations

(1) 'A' dies surviving him a son, a daughter, a widow and a mother. All of them take simultaneously and equal shares. Each takes one fourth share. If 'A' would have died leaving two widows in stead of one as above both the widows would take one fourth share as tenants in common and each would get one eighth.

(2) 'A' dies leaving a widow, a son, three grandsons of a predeceased son, a daughter and two daughters of a predeceased daughter. 'As' property will be divided in five equal shares. The widow will get one share, the son will get one share, three grand sons of a predeceased son will get one share *i.e.* each grandson getting $\frac{1}{15}$th of 'A' property, the daughter will get one share and the two daughters of the predeceased daughter will get one share *i.e.* each daughter's daughter gets $\frac{1}{10}$th of 'A' property.

(3) The surviving heirs of a Hindu intestate are a son, a daughter, a great grandson of a predeceased son, a great granddaughter of another predeceased son. The property of the intestate shall be shared by there heirs equally..

Succession of a female Hindu.

The property of a female Hindu dying intestate shall devolve (a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband ; (b) secondly upon the heirs of the husband ; (c) thirdly, upon the mother and father ; (d) fourthly, upon the heirs of the father ; and (e) lastly upon the heirs of the mother

Provided that (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to above in orders specified therein, but upon the heirs of the father ; and (b) any property inherited by a female Hindu from her husband or from her father in-law shall devolve in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the

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other heirs referred to above in the order specified therein, but upon the heirs of the husband.

The order of succession among the heirs referred to in section 13 shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules namely :—

Rule 1 :— Among the heirs specified in sub-section (1) of section 13, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2 :— If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3 :— The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of section 13 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

Illustrations

(1) The surviving heirs of a female Hindu dying intestate are three sons, two daughters and the husband. Each takes one sixth share.

(2) The surviving heirs of a female Hindu dying intestate are a son, two sons of a predeceased son and three daughters of a predeceased daughter. The son gets one third, each grandson one sixth and each daughter of the predeceased daughter one ninth.

(3) The surviving heirs are mother, father and father's mother. The first two take in equal shares to the exclusion of the third.

(4) The surving heirs are a son and a husband's brother. The son gets the whole to the exclusion of the husbands brother.

(5) The surving heirs are the husband's brother and mother and father.

(6) The property was inherited by a female Hindu from her husband. No heir of the husband survives. It goes to the

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government by ercheat and not to the parents or the heirs of those parents.

(7) The property was, inherited from father. The surviving relations are the husband's heirs. No heir of the father survives the deceased. The property will go by ercheat to the Government and not to the heirs of the husband.

(8) A female Hindu inherited property from her father. On her death, father's son (brother) and father's daughter (sister) are the only surviving heirs. They will get the property in equal shares. They inherit as the son and the daughter of the father treated as propositus.

(9) A female Hindu inherited property from her mother The surviving heirs are father, father's son (brother) and father's daughter (sister). The last two will inherit to the exclusion of the father, even though they claim relationship through him. Appears rather strange.

(10) The property was inherited from father. The surviving relations are mother and father's son and father's daughter. All get in equal shares. Mother gets one share as widow of the father treated as propositus.

104. The property of a Hindu intestate shall be divided among heirs specified in class II of the schedule so that those in the first entery shall be preferred to those in the second entery ; those in the second entry shall be preferred to those in the thire entry ; and so on in succession, (section 7). Further more the property shall be divided between the heirs specified in any one entry in class II of the schedule so that they share equally, (section 9)

Illustrations

(1) The surviving heirs are father, brother and sister's daughter. Father gets the whole property to the exclusion of the other heirs who are placed under entries II and IV.

(2) The surviving heirs are brother, sister, father's brother, mother's mother. The last two heirs will get nothing while the first two heirs will get the estate simultaneously in equal shares.

Remark :— The heirs specified in class II of the schedule have been mentioned in previous article.

105. The order of succession among agnates or cognates, as the case may be of a Hindu intestate, shall be determined

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in accordance with the rules of preference laid down as under :-

Rule 1 :— Of two heirs; the one who has fewer or no degrees of ascent is preferred.

Rule 2 :— Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3 :— Where neither heir is entitled to be preferred to the other under rule 1 or rule 2 they take simultaneously.

Computation of degrees among agnates or cognates are made in accordance with the provisions of section 11 of the Hindu Succession Act forming appendix to this book.

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CHAPTER IX

WILLS

Introductory:

A will or testament is the declaration in a prescribed manner of the intentions of the person making it, with regard to matters which he wishes to take effect *upon or after his death.* It may be made for the purpose of appointing the executors or other person whom he wishes to manage or assist in managing any part of his estate or for the purpose of making dispositions of property to take effect on or after his death, or appointing guardians of his infant children after his death, or exercising any power exercisable by him in his manner or revoking or altering any *previous will* of his or for any similar purpose taking effect on or after his death. The person making the will is in this title called "the testator" and where the context admits the word "will" includes a will or testament.

The essential characteristics of a will are that during the life of the testator, it is a mere declaration of his intention and that it may be freely revoked or altered in a prescribed manner. It is, therefore, *ambulatory,* or without a fixed effect until the testators death; upon that event it crystalises and may for the first time take effect as an appointment, disposition or otherwise according to its tenor; it requires the death of the testator for its consummation, and it must be distinguished from a disposition made *inter vivos,* such as a voluntary settlement with a power of revocation, or any instrument consummate on execution of the maker, althongh intended to take effect on some future event

The revocable nature of a will cannot be lost, even by a declaration that the will is irrevocable or by a covenant not to revoke the will.

Wills in Kashmir:

Customary Law of Kashmir racognises two main kinds of permanent transfers, *viz.* a voluntary transfer and a transfer for necessity. The former category includes gifts and wills and the latter division includes mortgages and sales for purposes recognised as necessary. There is at the same time a class of transfers recognised by the customary law which lies upon the dividing line, which is viewed as not being purely voluntary nor yet all together for necessity. Of this description are gifts to a person who has resided with a donor, and been treated as a son, or a person who has been associated with him and rendered him

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services; and gifts for religious purposes. The donor is recognised as being under some sort of obligation in both classes of cases. Gifts for religious purposes are also commonly permitted within moderate limits without consent of agnates.

106. Subject to the provisions hereinafter mentioned every person who is of sound mind and not a minor may dispose of his property by will.

Remark 1 :— The power of a Hindu to make a will is wholly unknown to the pure Hindu Law. But the testamentary power of Hindus has now been recognised by a long established custom and judicial decisions. In one of the cases (Bir Pertab versus Rajender Pertab (1867) 12 M. I. A, I, 37—38] the Judicial Committee observed :—"It is too late to contend that, because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned have determined that the testamentary power exists and may be exercised at least within the limits which the law prescribes to alienation by gifts inter vivos.

Remark 2 :— The age of majority as regards matters other than marriage, dower, divorce and adoption, is now regulated by the J & K Majority Act. Section 9 of the Act declares that a person shall be deemed to have attained majority when he shall have completed the age of eighteen years. In the case, however, of a minor of whose person or property a guardian has been appointed, or of whose property the superintendance has been assumed by a court of wards, the Act provides that the age of majority shall be deemed to have been attained on the minor completing the age of twenty one years. Minority under the Mohammadan Law terminates on completion of the fifteenth year ; therefore, before the passing of the Majority Act, a Mohammadan who had attained the age of fifteen years was competent to make a valid will. But this rule of Mohammadan law so far as regards matters other than marriage, dower and divorce must be taken to be supreseded by the provisions of the Majority Act. Hence minority in the case of Mohammadans, for purposes of wills, gifts, wakafs etc. terminates not on the completion of the fifteenth year, but on completion of the eighteenth year.

Remark 3 :— The guiding principles in regard to the *onus of* proof in the case of wills may be enuntiated in the following words. The first rule is that "the *onus prabandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator". The

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second rule is, that "if a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved the contents of the will, and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever they rely on to displace the case for proving the will." [Refer 1901, 23 All 405, 28 I. A.]

Remark 4 :— According to Ailan No. 19 dated 3rd Asuj 1980 published on page 512 of Revenue Circulars Volume V it was not permissible for anybody to will away his ancestral property. In Kashmir before rights of proprietorship were conferred on holders of Assami Rights, Ailan No. 19 dated 3rd Asuj 1980 governed the right of alienations by will, gift, sale etc of the holders of such Asami rights Under this Ailan, a copy of which is appended to this work, all alienations except those for religious purposes and in favour of near relations were forbidden. Further under para 2 of the Ailan alienations of self acquired property was also recognised and no restrictions were imposed on such alienations. But when rights of proprietorship were conferred on holders of Assami rights the general provisions of law regarding wills became applicable to people in Kashmir who hold property and desired to make alienations in one form or other. Ailan No. 19 dated 3rd Asuj 1980 referred to above ceased to have its application. The view held in the case Gangi Mali versus Kunga Mali 41 P.L R., J. & K. Section 77 that ancestral property could not be willed away by anybody governed the holder of an Assami right which had descended to him from an ancestor and which rights were in his hands as ancestral property. The ruling cannot be made applicable to holders of proprietry rights in any way.

Remark 5 :— According to Hindu law a person may dispose off by will his separate or self acquired property. The share which a co-parcener obtains on partition of ancestral property is ancestral property as regards his male issue. The male issue take an interest in it by birth whether they are in existence at the time of partition or are born subsequently. Such share, however is ancestral property only as regards his male issue. *As regards other relations*, it is separate property, and if the co-parcener dies without leaving male issue, it passes to his heirs by succession. [Refer Mulla's Hindu Law Art 223 part 4.]

Remark 6 : — The powers of a last Hindu male owner to dispose off his property, whether self acquired or ancestral, by will are unrestricted under the Hindu law. [8. J. & K. Law

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Reports page 186.]

Remark 7 :— Under the provisions of J. & K. Land Alienation Act of the year 1990 [Act No. 6 of 1990] permanent alienations by wills of agricultural land could not be effected for more than one fourth of the total holdings of the testator held by such person in the year 1990 in the Kashmir province. On the repeal of this enactment by the amending Act of the Abolition of Big Landed Estates Act of the year 2011 these restrictions, have now been completely waived.

107. Among muslim agriculturists in the valley the consent of the heirs is not necessary to validate a will. There is no limit to disposition of the property by will and therefore even more than the prescribed share can be bequeathed.

Illustration.

'A' a muslim agriculturist, bequeaths his entire property in favour of one of his heirs. Other heirs of 'A' don't give their consent to the contents of the *will* after the death of 'A'. The will cannot operate under the Moh'd law after 'A' death. But the will is good under the customary law.

Authority :— Mst. Azizi versus Ahmad Lone and others decided by the High Court of Judicature (Division Bench) on the 6th of Bahadoon 2002.

Note 1 :— The conditions required to be fulfilled for the validity of a will under the Mohammadan law are not required for the validity of a will under the Customary Law. Therefore the entire property can be bequeathed in favour of any person, even an heir, *independantly*. The consent of other heirs is not necessary for the validity of a will in favour of an heir when more than the sharia share is bequeathed.

In the case of Mst. Azizi versus Ahmad Lone and others (Decided by the High Court (D. B.) on the 6th of Bahadoon 2002.) their Lordships of the High Court held as under.

Case law cited.

".....The learned District Judge has repelled this contention by the following remark which appears in his judgment :—

'It has been argued by the learned counsel for the appellant that under the will the appellant could get her share. But I don't agree with him in this opinion. The will had been made in favour of some of the heirs by Rahman deceased. Under Moh'd Law a will made in favour of an heir is void unless consented to by all the other heirs of the deceased after his death. There is no proof on the file that the other heirs of the deceased had

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consented to the will after his death. Therefore this will is invalid.

'The District judge brushed aside this aspect of the case that the case of the parties was that they are governed by custom in matters of succession. When the parties are governed by custom the personal law does not come in and the consent of the heirs to validate the will is not necessary. Mst. Azizi has been held not to be a Khana Nashin daughter. She is, therefore, not an heir under customary law. The question is whether under customary law Rahman was entitled to dispose of his property by will. We have it on page 70 of Sant Ram Dogra's Customary law in question No. 79 which reads as under :—

Q.—Can a proprietor make verbally or in writing a disposition of his property to take effect after his death ?

A.—All tribes except as mentioned below.

An Assami can make verbally or in writing a disposition of his property to take effect after his death ; but such wills are rarely excuted among the Zamindars....."

"So under customary law there is no limitation on the power of a testator. The will, therefore, could be made by Rahman and it has been duly proved to have been made by him in favour of his daughters....."

Rivaj-i-am

Question 79 :—Can a proprietor make verbally or in writing a disposition of his property to take effect after his death ?

Answer—

All Tribes Except as Mentioned Below. An Assami can make verbally or in writing a disposition of his property to take effect after his death ; but such wills are rarely executed among the zamindars.

Wills regarding charity and gifts to relations are executed as the zamindars of Pattan say.

Zamindars of Kulgam and Kund, Rajputs of Deosar, Rajas of Yaripura and Uttarmachipura, Gujjars, Watals, and Sikhs of Achhabal, Watals, Bahats Hanz, and Sikhs of Baramulla and Watals and Gujjars of Badgam. No custom of making wills exists.

Pandits af Khanabal and Srinagar. The custom of making wills is not common. A man can dispose of his acquired property by will, but not the ancestral property.

Other Tribes of Pakhli. Wills if made according to the Shariat are executed.

Rivaj-i-am continued:

Questian 80—Where the power of bequest exists, is there any rule limiting its exercise ? If a proprietor may bequeath a part

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only of his property, to what share does this power extend? Can he bequeath more than the prescribed share with the consent of the heirs?

Answer—

Sunni Mussalmans of Avantipura and Baramulla Tehsils, all Tribes of Handwara, and Townspeople of Sopore. A father can bequeath more than the prescribed share. There is no limit to disposition of the property by will. Consent of the heirs is not necessary for execution of a father's will.

Sunnis of Avantipura Tehsil add that the will is made, and a larger share is given to the unmarried sons to cover the expenses of marriage.

Among the zamindars no will is executed without the consent of heirs.

All Mussalman Tribes of Kulgam, Rajputs of Deosar, Rajas of Yaripura and Uttarmachipura, Watals, Bahats and Dunga Hanz and Pandits of Anantnag Tehsil, Watals of Baramulla, Sunnis of Sopore and all Mussalman Tribes of Badgam and Nunar.

No custom.

But the Sikhs and Pandits of Badgam, however, say that father's orders are never disobeyed.

Gujjars of Chharar. A will is made when the testator is in sound health. As regards other matters, no custom exists, because when Gujjars make a will, they do it in favour of their relatives only.

As regards limitation of the powers of making a will, there is no rule.

Sunni Mussalmans and Gujjars of Achhabal. There is no rule fixed for bequest, because among the zamindars a bequest is made only for sons, son-in-law and daughters. Generally no greater share than the prescribed one is given by will.

Sunnis of Khanabal and Chharat, Shias of Pattan, Sopore, Nunar and Srinagar. Follow the Shariat in the matter.

Gujjars of Sopore. A man can bequeath up to one-third. He cannot bequeath more than this. In the matter of disposition by will, no other orders of the Shariat are followed except the observation of the limit of the share.

Sunni Mussalmans of Srinagar. An Assami can bequeath upto one-third of his property. He can exceed the prescribed, share with the consent of his heir.

Sikhs of Avantipura, Anantnag, Baramulla and Handwara

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Tehsils. A will can be made for the moveable property, but not for the immoveable one. If there be self-acquired property it can be disposed of at the pleasure of sons.

Pandits of Avantipura Tehsil and Handwara. No change takes place among the shares of heirs by will. If a Pandit has got no sons, he can make a gift of it by will.

Pandits of Kulgam and Baramulla Tehsils. A father is entitled to make a disposition of his property by will, though the custom is not widely followed. A Pandit can bequeath his ancestral or acquired property.

Pandits of Sopore. No limit is fixed for bequest. There is no necessity of the consent of heirs.

Pandits of Achhabal. A man cannot bequeath his ancestral property, but he can bequeath his self-acquired property, whether his relations consent or dissent.

Pandits of Srinagar add that no bequest against the custom of the family regarding marriage of a daughter can hold.

Note 2 :— It will be obvious after reading the answers to the relevant questions pertaining to the custom of wills from the Code of Tribal Custom by Pandit Sant Ram Dogra that the Pandit mentions certain exceptions to the general rule enunciated in the article. These exceptions have not, so far, to the best knowledge of the author been judicially recognised.

108. The necessary conditions that a 'will' may be effectual to confer a title to the property to the beneficiary under the 'will' are the following :—

(1) The testator must be dead.
(2) The testator was legally capaciated to make the 'will' on the date of its execution.
(3) The 'will' must not have been revoked or altered.
(4) The testator had the intention of making it and that his mind was unaffected by fear, fraud, or undue influence or by other matters which by law vitiate his intention

Remark :— In order that the testator may be legally capaciated to make a will on the date of its execution it is necessary that the testator should have been of a sound mind, memory and understanding. In order to constitute a sound dispossing mind, a testator must not only be able to understand that he is by his will giving his property to one or more objects of his regard, but he must also have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will he is excluding from

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participation in that property. For this purpose it is essential that no disorder of the mind shall poison his affection, prevent his sense of right or prevent the exercise of his natural faculties that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which if the mind had been sound would not have been made. But perversion of moral feeling does not constitute unsoundness of mind. Nor is a will revoked by the subsequent insanity of the testator.

A minor is not regarded to be legally capaciated to execute a will and therefore a will executed by a minor cannot take effect as a legally valid will.

Remark :— A will is *ambulatory* or without a fixed effect as until the testators death ; upon that event it crystalises and may for the first time take effect as an appointment, disposition or otherwise. It requires the death of the testator for its consummation.

109. Under section 27 (1) chapter II of the J. & K. Hindu Succession Act of 1956, any Hindu governed by the provisions of the Act may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with any law for the time being in force and applicable to Hindus.

Explanation 1 :— The interest of a male Hindu in a Mitakshara coparcenary property shall, not withstanding anything contained in the Hindu Succession Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him within the meaning of the aforesaid provisions.

Explanation 2 :— Nothing contained in sub-section (1) of section 27 as specified above shall affect the right to maintenance of any heir specified in the schedule attached to the Act by reason only of the fact that under a will or other testamentary disposition made by the deceased the heir has been deprived of a share in the property to which he or she would have been entitled under the Act if the deceased had died intestate.

Remark :— For authority please refer to the provisions of section 27 chapter III of the J. & K Hindu Succession Act of 1956 forming an appendix to this book.

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CHAPTER X

MARRIAGE

Introductory

History reveals that even though sexual relation among savages were of the most loose and indefinite character, it would be erroneous to suppose that unqualified promiscuity had ever prevailed. The savage had his crude notions about ownership as regards his weapon, implements and dress, and it is not likely that he could be without such notion about ownership as regards women. Thus, in the midst of prevailing promiscuity, he formed unions of some degree of permanance which were maintained, if necessary, by force. As a result of indefinite sexual relations, parentage was not certain and such a state was hardly conducive to the welfare of the off-spring. Besides, promiscuity entailed excessive labour on women and deprived men of domestic assistance. Hence by the law of survival of the fittest in the struggle for existence, groups having definite sexual relations evolved out of groups in the then prevailing promiscuity. But as, however, under ordinary conditions the rearing of more numerous and stronger off spring must have been favoured resulting in more sexual relations there was a tendency towards decline of promiscuity. Thus marriage was a first practice, then the *practice grew into a custom*, and the *custom ultimately passed into law.*

Manu has described eight forms of marriages namely :— *Paishacha, Rakhshasa, Gandarwa, Asura, Arsha, Prajapatya, Daiva* and *Brahma*. He has condemned the *Paishacha* as the worst type of marriage. Manu observes, "whenever the lower secretly embraces the damsel, either sleeping or flushed with strong liquor, or disordered in her intellect, that sinful marriage called *Paishacha* is the basest". The seizure of a maiden by force from her house while she weeps and calls for assisstance, after her kinsmen and friends have been slain in battle or wounded and their house broken open is the marriage styled as *Rakhshasa* by Manu. *Gandarva* form which is an improvement over the last is the "reciprocal connection of a youth and a damsel with mutual desire". This marriage is contracted for the purpose of amorous embraces and proceeding from sexual inclination. But when "the bridegrom, having given as much wealth as he can afford to the bride's father and paternal kinsmen and to the damsel herself, takes her volunlarily as his bride, the form is characterised as *Asura* by Manu. "When the father gives his daughter away after having received from the bridegroom a pair of cows or two for uses prescribed by law,

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that marriage is termed *Arsha'*. When the father gives away his daughter with due honour, saying distinctly, 'May both of you perform together your civil and religious duties', the rite is called *Prajapatya* "The rite which sages call *Daiva* is the gift of a daughter whom his father has decked in gay attire, when the sacrifice is already begun, to the officiating priest, i. e. the bridegroom who performs that act of religion". The gift of a daughter, clothed and decked, to a man learned in the Veda, whom her father voluntarily invites and respectfully receive, is the nuptial rite called *'Brahma'*.

To a Hindu, the importance of marriage is heightened by the sanction of religion. In Hindu Law, marriage is a *sacrament* or *sanskar*, necessary for regeneration of men of the twice born classes and it is the only sacrament allowed to women and Sudras out of the ten regenerating ceremonies prescribed by Manu. A christian marriage is looked upon as a contract A muslim marriage which has as its object the *procreation ond legalizing* of children is also a contract. But as it has a sort of some religious sanctity so it occupies a position between a contract and a sacrament. The *Vedas* have defined the marriage as the *union of flesh with flesh and bone with bone.*

The different kinds of marriage as depending on the number of parties are as under :—

(i) *Promiscuous Marriage* -— The union of certain number of males and a certain number of females, which is hardly different from promiscuity. It was prevallent amongst the Nairs of Malabar.

(ii) *Polyandry* :— The union between one woman and several men related or unrelated. It prevails in Tibet and Cylon. The marriage of Draupadi with the Pandvas is probably the only one instance of the kind of marriage among the Hindus.

(iii) *Polygamy :*— The union of one woman and several women is called Polygamy.

(iv) *Monogamy* :— The union of one man with one woman. This is the most exclusive form of the conjugal relation.

The ancient Hindu law relating to marriage has been replaced in India by the Hindu Marriage Act XXV of 1955. The Act received the assent of the *Rashtrapati* (the President) on 18th of May 1955. On the basis of the same Act, the Jammu and Kashmir Hindu Marriage Act of 1955 (Act No. VIII of 1955) was also adopted in the state The Act received the ascent of the Sadar-i Riyasat on the 2nd of November 1955. The Act forms an appendix to this work.

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110. A marriage to be legally binding must fulfil the following conditions namely :—

(a) The parties must not be related to each other within the prohibited degrees of consanguinity, which include :—

(1) *Amongst Mohammadans :*— A mother, step mother, paternal or maternal grand mother how high so ever, sister of the whole or half blood, paternal or maternal aunts, brother's sister's daughter of the whole or half blood, mother-in-law, daughter or grand daughter of enjoyed wife, son's or son's son's wife, daughter's son's wife, foster mother, or any other female related by fosterage.

(2) *Amongst Hindus :*— The female descendants within the seventh degree inclusive from the father, paternal grand father and the rest ; and the female descendants as far as the fifth degree (inclusive) from the maternal grand father and the rest ; also the female descendants within the seventh degree (inclusive) from the father's cognates (or *bandhus*) and their six ancestor's through whom those females are related ; and also the female descendants, as far as the fifth degree (inclusive) from the mother's bandhus, and their four ancestors through whom they are related.

(3) *Amongst Hindus* :— The statutory conditions specified in section 5 of the Hindu Marriage Act of 1955 forming an appendix to this book must also be fulfilled.

(b) They must belong to castes between which inter-marriages are permitted.

Question 9. — Enumerate the relatives with whom marriage is unlawful ? Rivaj-i-am

Answer :—

All Mussalman Tribes. The Shariat is followed in the matter. The relatives with whom marriage is unlawful are the following :

Brother's daughter, sisters's daughter, foster-sister's daughter father's sister, mother's sister, mother, mother-in-law, grand-mother and step mother.

The common criterian of legality of marriage is that the wife should have no tinge of milk with her husband in her veins.

Marriage with her adopted son's wife is not customary.

All Hindu Tribes Except as Below. A man is to marry outside his own Gotra. Marriage is unlawful with any of the relations within seven generations, but among the Sikhs 3 generations only are excepted.

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No marriage is contracted with any member of a Prohat's family.

Rajputs of Deosar. A man may marry outside his own mother's and grand-mother's family. He cannot marry a girl of his own Gotra.

Question 11.— Between what tribes is marriage lawful, and between people of what religion ? Is there any other cause which operates to bar marriage ?

Answer :—

All Tribes Except as Below. Marriage is lawful with a person of one's own tribe.

Profession is an index to superiority or inferiority of a person's tribe. Menials marry the menials and the gentry with the gentry.

Mussalmans do not marry with men of other religions, Hindus add that marriage with the Sagotris, Prohats, Buhars and people of other religions is prohibited.

Brahman Sikhs do not marry with Jats, Chhembas. Kalals and other tribes.

Rajputs of Deosar. The custom of reciprocal marriage exists with Aandrals, Ballorias, Aantals, Bhadwals, Gulerlas, Pathanias. Katoches, Bhatials, Sumbrias, Kalhurias, Chambials, Amba Rains, Bhujials, Rukwals, Chibs, Bhans, Langehs, Jayas and Gulyanias,

Question 11 (a)— Does there exist any idea of caste or tribe and if so, to what extent ?

Answer :—

All Mussalman Tribes. The idea of caste or tribe exists to a great extent among both the Hindu and Mussalman tribes. Among the Mussalmans following tribes are considered to be high.

Sayeds, Mirs, Shahs, Pirs, Babas, Alims (Learned men), Quresh. Mirza Beg and Maliks.

The low castes are :—

Watals, Shup-Watals, Milkmen, Barbers, Blacksmiths, Carpenters and Potters.

Hindus of high caste do not marry with men of the low caste. Pandits do not generally marry with the Prohats, Buhars

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and Bat Buhars.

Question 14.— Are the degrees prohibited by consanguinity also prohibited by fosterage ?

Answer :—

All Mussalman Tribes. Yes.

All Hindu Tribes. Marriage with the issue of a foster mother is disallowed. With her relations it is not prohibited.

Hindus of Sopore add that other men of the family besides the man who was suckled can marry the daughter of a foster-mother.

Remark :— Section 4 of the Jammu and Kashmir Hindu Marriages Act of 1955 provides that any text, rule or interpretation of Hindu Law *or any custom or usage as part of that law* in force immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made in the Act. The section also favours that any other law in force immediately before the commencement of the Act shall cease to have effect in so far as it is incon-sistent with any of the provisions contained in the Act. It is a matter of judicial interpretation if the words used in the section *"or any custom or usage as part of Hindu Law"* are capable of being interpreted as meaning "Hindu Law as *modified by custom"* as used in the Jammu and Kashmir Sri Pratap Consolidation Regulation of 1977.

111. Among Mussalman Tribes a man cannot be married at the same time to any two women who stand in such a degree of relationship to each other that if one of them had been a male, they could not bave married.

Question 12.— May a man be married at the same time to any two women who stand in such a degree of relationship to each other that if one of them had been a male, they could not have married ? Rivaj-i-am

Answer :—

All Mussalman Tribes. Such marriages are prohibited.

All Hindu Tribes. Such marriages are not customary, though it is not prohibited by the Dharam Shastra

112. Among all Mussalman Tribes of the valley *Ijab o-Qubal* is the binding part of a marriage ceremony. Among Hindus the Lagan or lighting of the sacred fire, and the *Kanya dan* or transfer of the boys family are essential ceremonies.

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Rivaj-i-am

Question 18.— What is the essential and binding part of the marriage ceremony.

Answer :—

All Mussalman Tribes. Ijab-o-Qubul is the binding part of the ceremony.

All Hindu Tribes. The essential ceremony is the Lagan or lighting of the sacred fire, and the *Kanya-dan* or transfer of the girl to the boy's family.

113. Among the muslims of the valley if parties to marriage are of full age, (having attained the age of majority) their consent is essential to the validity of a marriage. But if the parties or minors or any one of the parties is a minor then the consent of the lawful guardian of the minor is essential to the validity of a marriage.

Remark 1. The absence of the proper guardian's consent in the case of a Mohammadan marriage will merely render the contract *suspensive* on the guardians consent, and upon attaining majority the minor may ratify it and thus give it all the effects of a legal marriage.

Rivaj am Continued

Question 17.— Whose consent is necessary to the validity of marriage ? Give the rule—

(1) If both adults are minors ;

(2) If both parties are of full age.

Can the woman consent to her own marriage without the consent of her guardians ?

Answer :—

All Mussalman Tribes except as mentioned below. If the female is adult, her consent is necessary for the validity of marriage, but if she be a minor, consent of her guardian is essential.

Though adults can marry themselves according to the Mohammadan Law, but that is not recognised by custom.

Pirs, Babas, and Sayeds of Chharat. They follow the Shariat strictly.

All Hindu tribes, Bomba Rajas of Yaripura and Uttarmachipura. Consent of guardians is necessary for the validity of marriage. No woman can give her own consent for her own marriage.

A mother of good character also is entitled to give her daughter in marriage.

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114. Among all Mussalman tribes brother, uncle, maternal uncle, and cousin are generally competent witnesses to a marriage contract. In their absence neighbours and village fellows stand as witnesses to a *Nikah*. Among *Sunnis* it is customary to have two witnesses and a representative (Vakil) for either party to a marriage contract.

Question 19:— Who are competent witnesses to a marriage contract ? Rivaj-i-am

Answer :—

All Mussalman tribes except as mentioned below. The competent witnesses are :—

Brother, uncle, maternal uncle, and cousin. In absence of all of them, neighbours and village fellows stand as witnesses to the Nikah. Among the Sunnis it is customary to have two witnesses, and a representative (Vakil) for either party at a marriage contract.

Watals of Kulgam add that Chowkidar, Lambardar and Maulvi also are competent witnesses.

Rajas of Yaripura and Uttarmachipura. The agents of either parties to a marriage contract are competent witnesses. If there be relatives present on such an occasion, they are competent witnesses, but if not, matters little.

All Hindu Tribes. They do not hold marriage to be a civil contract, but think it to be a sacred ritual. The Prohats, the Pandits, and the relations accompanying the marriage procession are competent witnesses in case of a dispute which is very rare.

The sacred fire and Bhagwan (Lord God) are deemed the best witnesses.

115. In the case of Mohammadans, a widow must not remarry within the period of her *iddat*, which is fixed at four months and ten days, but the ordinary period for a divorced wife who is under obligation to observe Iddat is three lunar months.

116. Among the Shias *Mutta* form of marriage obtains in all tehsils of the valley. Child born of the parties of *Mutta* inherits, but they don't inherit from each other.

Question 27.— Does Mutta of marriage obtain among the Shias ? Is divorce necessary in case of Mutta? Rivaj-i-am

Do the parties of a Mutta inherit from each other ? Is

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Iddat observed in Mutaa marriages in death or divorce ?

Is marriage for a limited period lawful among the Hanafis ?

Answer :—

Shias of all Tehsils. Among the Shias Mutaa form of marriage obtains Divorce is generally effected before the period of Mutaa expires Child born of the parties of a Mutaa inherits, but they do not inherit from each other. Iddat is observed in Mutaa marriages on death or divorce.

All tribes except as noted above. No custom

117. Among all tribes in the valley no presumption of marriage ever arises from co-habitation.

Rivaj-i-am

Question 26.— Is marriage ever presumed from co-habitation though the full marriage ceremony may not have been performed

Answer :—

All Mussalman tribes. No presumption of marriage ever arises from co-habitation. Copulation in such a condition is considered to be fornication. Unless Ijab-o-qubul ceremony is performed co-habitation is deemed unfawful.

All Hindu tribes. Marriage is never presumed from co-habitation. The observance of marriage ceremony is essential.

118. Remarriage of widows is permitted both under custom and Mohammadan law after the expiry of *Iddat* among Muslims of all tribes in the valley.

Rivaj-i-am

Question 25.— Is remarriage of widows permitted ?

Answer :—

All Mussalman tribes except as mentioned below. Yes, after expiry of the Iddat period, which ranges between 90 and 132 days according as the woman has been divorced or her husband has died.

All Sikhs except as noted below. Widows generally remarry their husband's younger or elder brother by Chaudar-andazi (casting a red sheet over the head of the widows on recitation of Ardasa prayers).

Widows can marry a stranger with the consent of her husband's brothers or father.

Pandits of all Tehsils, Rajputs of Deosar, Sikhs of Kathi Darwaza and Gakkhars of Karewa. Widows do not remarry.

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CHAPTER XI

DIVORCE

Introductory

A contract of marriage under the Mohammadan Law may be dissolved in three ways namely (1) by the husband at his will without the intervension of the court; (2) by mutual consent of the husband and wife without the intervention of the court or (3) by a judicial decree at the suit of the husband or wife, a wife being unable to divorce herself from her husband except by obtaining a judicial decree in that behalf. When the divorce proceeds from the husband it is called *Talak*; when it is effected by mutual consent of the husband and wife, it is called *Khula* or *mubarat* according to the terms of the contract bewteen the husband and the wife. Roman Law allows divorce (1) by the mutual consent of the parties or (2) at the choice of either of them. Under the ancient Hindu Law once a marriage was regarded as always a marriage. But the new legislations adopted in this behalf have also legalized the dissolution of Hindu marriages on grounds specified in the legislations.

Generally, divorce may be classed under two heads :—

(1) Divorce a *vinculo matirmonii* or dissolution of marriage allowable under :-

(i) Circumstances affecting the validity of marriage or (ii) disagreement of a lasting nature between the parties by which the marriage tie is completely dissolved and the parties may be free to marry again.

(2) Divorce a *mensa at thora* or fiducial separation, allowable in cases of present disagreement though there may be hope of future reconciliation between them by which parties are permitted, to live separately and either of them is prevented from enforcing restitution of conjugal rights.

In Kashmir the cases of divorce are not frequent. But there are certain customary peculiarities in this system which are mostly not recognised judicially the reason being that disputed case of divorce in courts have not been many. The following articles contained in this chapter shall indicate these peculiarities when reference to other systems of this branch of law prevalent in the country is also made for comparison sake.

119. Generally Among Mohammadans of all classes a man

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may divorce a wife on the ground of (a) disobedience (b) immorality (c) change of religion; and (d) contagious diseases. The custom of divorcing a wife without assigning a reason does not prevail.

Rivaj-i-am

Question 20.—Upon what grounds may a wife be divorced? Is change of religion a sufficient cause? May a husband divorce his wife without assigning any cause?

Answer :—

All Mussalman tribes except as mentioned below. The following are the grounds for a divorce :—

(1) Disobedience;
(2) Immorality;
(3) Change of religion;
(4) Contagious diseases.

The zamindars do not divorce a wife without assigning any cause. Shias of Pattan add that impotency of the husband and inconsistency of the ages of the parties to a marriage contract are other grounds for a divorce.

Bomba Rajas of Yaripura and Uttarmachipura, Shup-watals of Kulgam and all Hindu tribes except as noted below Divorce is not generally recognised. Change of religion is not a sufficient ground for the annulment of marriage.

Sikhs of Jogigund and Baramulla. Divorce is not customary, but a wife may be released on the grounds of immorality and disobedience.

Sikhs of Baramulla add that a wife who becomes a convert to another religion voluntarily is not taken back by her husband.

Any person releasing his wife on no ground is given Dharam-Dand (punishment according to the Shastras).

Rivaj i-am

Question 10 —What physical defects will be sufficient grounds for the annulment of a marriage which has actually taken place?

Answer :—

All Mussalman tribes except as given below. Impotency, incurable diseases, leprosy, insanity, or crippleness is considered a sufficient ground for annulment of a marriage; but blindness is not considered so

Among the Sunni Mussalmans of Baramulla, divorce of the wife is obtained in all cases except in case of impotency, but the Srinagar Mussalmans say that divorce is necessary in all these

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cases. Nikah is not nullified by itself in such cases.

Shias of Tral, Pirs, Babas and Sayeds of Avantipur Tehsil and Mussalmans of Khanabal. The Shariat is followed in the matter.

Zamindars of Chharat and Sunni Mussalmans of Anantnag.

Impotency is a sufficient ground for the annulment of marriage. In all other cases, consent of the husband for a divorce is secured.

Gokkhars, Gujjars, and Watals of Anantnag. Like the Hindus marriage is not annulled, on the defects given above. Remarriage is not common among them

Mussalmans and Watals of Anantnag add respectively the change of religion and inconsistency of the ages of the parties as other grounds for the annulment of a marriage.

All Hindu tribes except as mentioned below. Marriage is not annulled on any ground even after the husband's death.

Sikhs of all Tehsils except those of Kathi Darwaza. A marriage is never annulled except in case of release by the husband which is done formally by a deed being written up before the *Baradari*.

Immorality and impotency are sufficient grounds for a release from the marriage tie.

Under the Customary Law the formalities which must be observed to constitute (1) a revocable divorce and (2) an inrevocable divorce are specified by Pt. Sant Ram Dogra in his Code of Tribal Custom in answer to question 21. The question along with the answer is given below for the sake of reference.

Question 21.— What are the formalities which must be observed to constitute (1) a revocable, (2) an irrevocable divorce? Rivaj-i-am

Answer :—

All Mussalman tribes except as mentioned below. Revocable divorces are made in the way given below.—

(1) By utterance of the words "Mojhish chhiam, (you are just like my mother), *Bainihish chhiam*" (You resemble a sister) "Pirbai hish chhiam" (you are just like a Pir woman); and the likeness of prohibited degrees of kindred for marriage is uttered to the wife.

(2) By saying once to the wife, that it is unlawful for the husband to enjoy her body; and sometimes this sentence is repeated twice.

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Irrevocable divorce—

(1) In confirmity with the orders of the 4 sects of Islam the body of the wife is declared to be unlawful for enjoyment.

(2) Three Talaks are repeated by the husband to the wife and that is customary among the zamindars of Kashmir.

The Mussalman's of Badgam, however, add that Talak's are administered by the Maulvi in presence of a witness.

Among the nobility divorce is effected by its pronouncement once only.

Shias of Pattan and Badgam. The custom of revocable divorce is not current among them. If it is done so, reunion is effected by recitation of Istigfar, and Ijab-o-qubul is not recited a new.

To make a Sih Talak (divorce), recourse is had to the Alim, who recites it as an agent and gives a receipt for it, attested by two justiciaries. This Alim keeps a register with him for entry of a divorce.

All Hindu tribes, Rajas of Yaripura and Uttarmachipura, and Watals of Kulgam. No custom.

120. **Under custom chronic diseases and impotency of the husband among Mussalman Tribes are the general grounds on which a wife can claim release from the marriage ties with her husband. In some cases inability of the husband to support his wife is also put forward as a plea for annuling of the marriage ties.**

(2) A woman who is the wife of a person governed by the Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the grounds specified in section 2 of the J. & K. Muslim Marriage Act of 1999.

Rivaj-i-am

Question 23.— Upon what grounds can a wife claim release from the marriage-tie ?

Answer :—

All Mussalman Tribes—Chronic diseases and impotency of the husband are the general grounds of release, but inability of the husband to support his wife is generally put forward as a plea.

Sunnis of Kulgam, Anantnag Tehsil, and Pattan part of Baramulla Tehsil, add that discrepancy in the ages of the parties

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immorality or inattention of the husband and change of religion also are the grounds for release.

Bomba Rajas, Watals of Anantnag, Bijbehara and Kulgam, Rajputs of Deosar, Pandits of all Tehsils, and Sikhs of Kathi Darwaza. No custom.

Sikhs of all Tehsils except as noted above. A wife can get release on the death of her husband. To give release in a husband's lifetime is not customary, but release is possible even in this case if either of the parties is of bad character.

Sikhs of Sri Partap Singhpora Tehsil add that impotency as well as immorality is a valid ground for claim of release from the marriage tie.

121. The only claim that a divorced wife has against her husband is the payment of dower to her provided that the dower does not stand remitted,

Question 22:— Has a divorced or superseded wife any claims against her husband? If so what, for maintenance or for a specific share of his property? Does she lose such claims if she be divorced on the ground of adultery? Rivaj-i-am

Answer :—

All Mussalman tribes except as noted below. The only claim that a divorced wife has against her husband is the payment of dower to her, provided that she has not remitted the dower, which is done in case of a release being requested by the wife. Sometimes a wife pays money to the husband for her speedy release from the marriage tie.

The superseded wife is entitled only to maintenance provided that she remains at home.

A divorced wife has every claim to her dower, even if she be divorced on the ground of adultery. Divorced wives are allowed maintenance for the Iddat period.

Mussalmans of Sopore and Srinagar, and Gujjars of Badgam. No dower is paid to a wife divorced on the ground of adultery, Sopore Gujjars do not divorce a wife commiting adultery, but a high value (Rs. 100) is set upon her release. The amount is paid by the man whom she marries.

Watals and Shup-watals of Kulgam. No custom, as it does not occur among them on account of their property. They do not divorce their wives for adultery.

All Hindu Tribes, Bomba Rajas of Yaripura and Uttarmachipura. The superseded wife gets maintenance even if she lives

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apart from her husband. No custom of divorce obtains.

122 Among Hindus either party to a marriage, whether solemnized before or after the commencement of the Jammu & Kashmir Hindu Marriage Act may present a petition to the district court praying for a decree for judicial separation on the grounds specified in section 10 of the Act. The Court may, however, after a decree for judicial separation is passed rescind the decree if it considers it just and reasonable to do so.

Remark 1 :— A marriage subsists on the decree of judicial separation but parties are absolved from the duty of cohabitation. As against this a divorce decree dissolves the marriage tie completely. It is a remedy lesser than the divorce. Judicial separation can be rescinded by the court in suitable circumstances under sub-section 2 of section 10 of the J. & K. Hindu Marriage Act.

Remark 2 :— Section 10 of the J. & K. Hindu Marriages Act specifies the grounds of Judicial separation. The grounds for Judicial separation are:—

(1) Desertion for two years.

(2) Such cruelty as causes an apprehension of harm and injury in the mind of the petitioner to live with him or her.

(3) Virulent form of leprosy for one year.

(4) Venereal disease in a communicable form (but not from the petitioner).

(5) Unsound mind for a period of not less than two years and

(6) Adultery namely sexual intercourse with others.

Remark 3 :— Desertion implies an abandonment against the wish of the person charging it. The essential requisites of desertion are that it must be :—

(a) Without reasonable cause ;

(b) Without the consent or connivance ;

(c) Without the wish of such party ;

(d) Without the *wilful neglect* of the petitioner ; and

(e) For a period of at least *two* years immediately preceeding the presentation of the petition.

The date of desertion must be specifically given and the attendant circumstances must be specifically stated.

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123 Generally among all Hindus, any marriage solemnized, whether, before or after the commencement of the J. & K. Hindu Marriage Act of 1955 may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the grounds specified in section 13 of the Act.

Remark 1 :— Section 13 of the J. & K. Hindu Marriages Act specifies the grounds on which a decree for divorce may be obtained by either party to the marriage. In particular, a decree of divorce may be obtained if there is no reconciliation between the parties within a specified period after the passing of a decree for Judicial separation or if a decree for restitution of conjugal rights is not complied with within the above specified period.

The grouuds for dissolution of marriage are :—

(1) Adultery.

(2) Conversion to another religion.

(3) Renunciation of world by entering any religious order.

(4) Sufference from the following malady or disease :-

(i) incurable insanity,

(ii) incurable or virulent form of leprosy, and

(iii) venereal disease in a communicable form for a period of not less than *three years* immediately preceeding the presentation of the application.

(5) (i) No resumption of cohabitation or

(ii) non-compliance with a decree for a restitution of conjugal rights for a period of *two years* or upwards after the passing of the decree.

(6) Presumption of death.

(7) In case of wife petitioner, (i) when the husband has another wife living ; (ii) rape, sodomy or bestiality.

Prior Hindu Law

Divorce is unknown to the Hindu Law. The prevailing sentiment of Hindu society is repugnant to the second marriage of a woman. Manu declares that "neither by sale nor by desertion can a wife be released from her husband. Let mutual fidelity continue till death".

Grounds of supersession of wife. The following are grounds laid down by Manu, justifying superssion (*tyaga*) :-

"A wife (i) who drinks any spirituous liquor (ii) who acts immorally, (iii) who shows hatred to her lord, (iv) who is incurably diseased, (v) who is mischievous, (vi) who wastes his property, may at all times be superseded by another wife".

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"A barren wife may be superseded by another in the eight year, she whose children are all dead in the tenth; she, who brings forth only daughters in the eleventh; she who speaks unkindly without delay".

"But she, who, though affected with illness, is beloved and virtuous must never be disgraced, though she may be superseded by another wife with her own consent".

Grounds of desertion of wife :— The following are the grounds of desertion laid down by Manu to justify the desertion of wife.

"A wife may be always deserted for conjugal infidility. A man may also forsake a wife who treats him with aversion or who is disobedient and self willed or who commits any sin in the first degree such as killing a Brahman, drinking forbidden liquor, stealing gold etc.

Grounds of desertion of the husband :— Grounds justifying desertion of a husband have been declared by Manu :—

"Though unobservant of approved usages, or enamoured of another woman, or divorced of good qualities, yet a husband may be constantly revered as a God by a virtuous wife".

Effects of Divorce

The following are the legal consequences that follow after the decree of divorce :-

(1) With the cessation of relationship of husband and wife between the parties to the divorce suit. the mutual rights and obligations arising out of marriage also come to an end.

(2) After one year of the date of the decree of divorce the parties can marry again.

(3) The parties cease to be husband and wife, but as regards the children of the marriage the parties continue to be their father and mother and the father is liable to maintain them during their minority.

(4) The only right which the either party retains against the other after the decree of divorce is to claim permanent alimony under section 25.

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CHAPTER XII

DOWER

Mahar or Dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage. Under the Mohammadan Law a marriage is a civil contract and it is likened to a contract of sale. A sale is a transfer for a price. In the contract of marriage, the "wife" is the property and the "dower" is the price. The object of dower is to serve as a check upon the capricious exercise by the husband of his power to dissolve the marriage at will. To obtain this end, it is usual to split dower into two parts, one payable on demand and the other payable on the dissolution of marriage by death or divorce. Introductory

124. The custom obtaining among the muslim tribes in the valley regarding the fixation and payment of dower and also the other incidents attached therewith have been summed up by Pt. Sant Ram Dogra in his Code of Tribal Custom in answer to question No. 24 which is incorporated below for a ready reference.

Question 24.— Explain what is meant by dower. State when it becomes payable, whether on consummation, or on the death of the husband, or on divorce. Riwaj-i-am

Is it payable in the case of divorce on the ground of adultery?

Answer :—

All Mussalman Tribes.—Mahar is a sum that a bridegroom agrees to pay to his bride on account of his enjoyment of her body. It is of two kinds.

(1) Mahar Muajjil,—Prompt Dower ;

(2) Mahar Muwajal,—Deffered Dower.

Mahar is generally paid on the demand of the wife.

Payment of the prompt dower is not made among the zamindars, and the gentry. For the prompt dower, ponies, cows, or sheep are written down in the Nikah-nama, and their issues are considered to be the property of the wife. The children of the wife inherit the property of their parents and payment of the Mahar is effected in that way or if the wife survives her hus-

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band, the whole of the landed property is entered in her name, and she has usu-fructuary rights in it for life or till remarriage.

On divorce, divorced wives get their deferred dower even if they are divorced on the ground of adultery.

But the Sunni Mussalmans of Anantnag, Baramulla, Sopore, Nunar, and Srinagar, and Gujjars of Nunar make an exception to the above saying, that wives divorced on the ground of adultery are never paid their deffered dowers.

Among the Sunni Mussalmans of Nunar, one-forth is remitted and for the remaining three-fourths, ponies and cattle are written in the Mahar-nama.

Bakkerwals and other tribes of Pakhli get the payment of Mahar cancelled by forcibly transmuting divorce into Kullah. An adulterous woman is never divorced until she supplicates for Kullah. (release from the marriage tie). Mahar is generally paid on the consummation of marriage in the shape of ornaments, clothes, etc.

Among the Gujjars, no portion of the dower is kept in arrears. The Mahar is paid at the time of Nikah ceremony before copulation.

Pirs, Babas and Sayeds of Bhharat, Watals and Shup-watals of Kulgam and Nunar, and Sunni Mussalmans of Pattan. Among them deferred dower is never paid It is generally remitted by gift.

Avantipura Tehsil. Sayeds, 9 Mohars (valued at Rs. 2 per Mohar) plus Rs 300 prompt dower plus Rs. 60 deferred dower.

Mirs of Rajpur and Batagund, Sheikhs of Kuchchmula, Shah of Luru, Mirza of Lurgam, Maliks and Khans of Aripall and Rains of Batapura and Ariball, Same as above.

Mirza of Manchhama—900 Ashrafis and 12 Thans (Than equal to a piece of cloth) as prompt dower and deferred dowers.

Gujjars of Kandi—prompt dower is a she-buffalo, valued at Rs. 60 each Rs. 30, Hasiri (ornaments for the neck) Rs. 20. bangles Rs. 10.

Kulgam Tehsil. Maliks of Shopyan—Rs. 300. Pirzadas and Sayeds of Shopyan Rs. 900. Babas of Kandipura—Rs. 300. Prompt dower Rs. 100. Deferred dower Rs. 200. Wains and Naiku of Kulgam—Rs. 80. Naiks of Ratnipura—100 Asrafis (at the current value of the coin). Watals and Shup-watals of Kulgam—from Rs. 10 to 15.

Rajas of Yaripura—From Rs. 10,000 to Rs. 60,000. It is roughly paid according to the status of the bridegroom, and pay-

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ment of the balance is excused.

Anantnag Tehsil. Gujjars—Rs. 100, the value of the she-buffalo given to the wife. Rs. 50 is remitted by Bakhshish to the husband. Watals—Rs. 9. Wains—Rs. 60. Gur (Milkmen)—900 Tankas *i. e.* Rs. 36. It is paid instantly. Bahats Hanz—Rs. 55. Dungo Hanz—Rs 50. Vegetable sellers—Rs. 36 Shaksaz and other men of menial professions - Rs. 36, is the deferred dower (the total dower being Rs 54). Pathan—900 Tankas.

Baramulla Tehsil. Gujjar Sayeds—Rs. 300 to Rs. 500. Kashmiri Gujjars—Rs. 300 to Rs. 900. Khoja Shias—Rs. 300 to Rs. 500. Gentry—Rs. 300 to Rs. 900. Mir, Dangar, Bat, Sheikh, Mirs of Abura, Watnu, Karahama, Wain of Wagura, Baramulla, Kriri, Shirpura, Bat of Tarzu, and Tapar Dangars of Palhalan and Shirpura, Sheikhs of Pattan, Baramulla Sumbal and Tarzu, Khans of Sriri Guewa, Wanigam Bala, Nihalpura and Khur—Mochi—Rs. 10. Gujjars—Rs. 300 to Rs. 500. Dauli Gujjars—Rs. 36 to Rs. 108. Other Mussalmans—900 Tankas. Wain and Goldsmiths—Rs 90. Watals—900 Tankas (Rs. 28/2) Dunga Hanz—Rs. 300. Nau Hanz and Bahats Hanz—Rs. 50. Gur (Milkmen)—900 Tankas (Rs. 28/2). Nanwai and Vegetable sellers—Rs. 28/8. Butchers—Rs. 50. Barbers—900 Tankas (Rs. 22/8). Dhobi—300 Tankas (Rs. 8/12). Kwajas—900 Ashrafis. Kakru—Prompt dower is generally 20 Asrafis Chintz Printer—Rs. 90 Gujjars—Rs 80. Awans, Dhunds, and Gakhars—Rs. 500 each Only Rs. 200 is paid. The rest is considered to be remitted. Khakhas. Same as above.

Uttarmachipura Tehsil. Ahmad Shah Drugmulla, Aziza Lone, Sadat of Khantpura, Aziza Dar Wanpura, Sadiq Lone Magam—900 Ashrafis. Sadat Khantpura—900 Ashrafis which is generally got remitted. Gujjars—Rs. 100. Potters—900 Tankas (Rs. 32/8) Dums—1,200 Tankas. Only Rs. 30 paid Zamindars—900 Tankas (Rs. 32/8). Zaildars and Gentry—Rs. 900 in cash. Ahmad Haji of Kazipura Khinhama, Wahab Lone, Awan Dardpura, Kwaja Saifulla, Wangam, Akbar Rathur, Gulrura, Kamal Rathar, Kaodara, Jabar Bat, Wanpura, and Said Lone, Gamru—Rs 300. Gujjars—Rs. 300.

Mahars in Sopore Town. Pirzadas and Shopkeepers—Rs. 300. Dandur (Vegetable sellers and Malyars)—Rs 30. Nanwai—Rs. 45. Watals—900 Tankas (Rs. 32/8). Shirgujri—Rs. 17. It is paid instantly. Dhobi—Rs. 18. Barbers—Rs. 25. Bhands—700 Tankas. Maliks—900 Ashrafis.

Sri Pratapsinghpura Tehsil Zamindars of Berwa, Manch-hama and Donsu—3,600 Tankas (Rs. 140). Zamindars of Nagam—Rs. 300, Zamindars of Kandi—Rs. 140 Dums—Rs. 140 Potters, Shaksaz Carpenters and Washerman—Rs. 140 Kandur—Rs 20. Gentry. Sayeds—900 Ashrafis. Pirzadas—Rs. 300. Mir and Wain—Rs. 300. Watals—1,200 Tanakas. Gujjars—Rs. 150. One fourth is remitted,

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and one she-buffalo is given. Blacksmiths—1,200 Tankas, 300 remission. Shias. Zamindars—Rs. 15 to Rs. 30. Pirzadas and Sayeds—Rs. 200 to Rs. 250.

Tehsil Khas Zamindars—Rs. 50 to Rs. 100. Sayeds—Rs. 900 Bat Telbal, Sheikh—Rs. 900. Qureshi—Rs. 900 and one Mohar. Mirsof Harvan—Rs. 900, Saidpura, Hamchi, Dars of Chatter hama—Rs. 300. Lones of Wailu—Rs. 100. Wain—Rs. 150. Bats of Safapura, Maliks of Dudharhama—Rs. 900. Gujjars of Prang—Rs. 150. Pathans of Pakhli—from Rs. 100 to Rs. 500. Bakerwals of Pakhli—Rs. 100 and one Mohar. Shir Gujjri—Rs. 12. Shup-watals—900 Thankas (Rs. 32/8). Watals—Rs. 12. Shaksaz—900 Tankas. Dums—700 Thankas. Hanjis of Singhara-300 Tankas. Naid 300 Tankas Nanwai—Rs. 20. Carpenters—900 Tankas (Rs. 32/8). Smith and Potters—Rs. 30. Washerman—Rs 18. Fisherman Rs. 150. Kashmiri shephered—Rs 11. Shias—from Rs. 12 to Rs. 50, Ganias of Bihama—Rs. 900. Kazis of Lar—Rs. 900.

All Hindu tribes. No custom.

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APPENDIX 1

THE JAMMU & KASHMIR HINDU SUCCESSION ACT, 1956.

Act No. XXXVIII of 1956.

An Act to amend and codify the law relating to intestate succession among Hindus.

Be it enacted by the Jammu and Kashmir State Legislature in the Seventh Year of the Republic of India as follows :—

CHAPTER 1

PRELIMINARY

1. *Short title and extent* :—(1) This Act may be called the Jammu and Kashmir Hindu succession Act, 1956.

(2) It extends to the whole of the State of Jammu and Kashmir.

2. *Application of Act.* :— This Act applies :-

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a lingayat or a follower of the Brahmo Prarthana or Arya Samaj.

(b) to any person who is a Buddhist Jaina or a Sikh by religion and

(c) to any other person who is nor a Muslim, Christian Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any matters dealt with herein if this Act had not been passed.

Explanation :— The following persons are Hindus, Budhists, Jains, or Sikhs by religion, as the case may be :—

(a) any child, legitimate or illegitimate both of whose Parents are Hindus, Buddists, Jains or Sikhs by religion;

(b) any child legitimate or illegitimate, one of whose parents is a Hindu, Budhist, Jaina or Sikh by religion and who is brought up as a member of the tribe community, group of family to which such parent belongs or belonged ;

(c) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion.

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II. The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. *Definitions and interpretation* :—(1) In this Act, unless the context otherwise requires,—

(a) "agnate"—one person is said to be an "agnate" of another if the two are related by blood or adoption wholly through males ;

(b) "cognate"—one person is said to be a "cognate" of another if the two are related by blood or adoption but not wholly through males ;

(c) the expression "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained by force of law among Hindus in any local area, tribe, community group or family :

Provided that the rule is certain and not unreasonable or opposed to public policy : and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family :

(d) "full blood", "half blood" and "uterine blood"—

(i) two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half blood when they are descended from a common ancestor but by different wives ;

(ii) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands.

Explanation.—In this clause "ancestor" includes the father and "ancestress" the mother ;

(e) "hair" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act ;

(f) "intestate"—a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect ;

(g) "related" means related by legitimate kinship :

Provided that illegitimate children shall be deemed to be

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related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.

(2) In this Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females.

4. *Over-riding effect of Act.*—(1) Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to effect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.

CHAPTER II

INTESTATE SUCCESSION

General

5. *Devolution of interest in coparcenary property.*—When a male Hindu dies after the commencement of the Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in clause I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation.—1. For the purposes of this section, the interest

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of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation—2. Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

6. *General rules of succession in the case of males..*—The property of a male Hindu dying intestate shall devolve according to the provisions of this chapter—

(a) firstly upon the heirs, being the relatives specified in Class I of the Schedule ;

(b) secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule ;

(c) thirdly, if there is no heir of any of the two classes then upon the agnates of the deceased ;

(d) lastly, if there is no agnate, then upon the cognate of the deceased.

7. *Order of succession among heirs in the Schedule.*—Among the heirs specified in the Schedule, those in Class I shall take simultaneously and to the exclusion of all other heirs ; those in the first entry in Class II shall be preferred to those in the second entry ; those in the second entry shall be preferred to those in the third entry ; and so on in succession.

8. *Distribution of property among heirs in Class I of the Schedule.*– The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules :—

Rule 1.— The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2.— The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3.—The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4.— The distribution of the share referred to in Rule 3–

(i) among the heirs in the branch of the pre-deceased son

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shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of the pre-deceased sons gets the same portion;

(ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions—

9. *Distribution of property among heirs in Class II of the Schedule.*—The property of an intestate shall be divided between the first specified, in any one entry in Class II of the Schedule so that they share equally.

10. *Order of succession among agnates and cognates.*—The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder:—

Rule 1.— Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2 — Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3.— Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

11. *Computation of degrees.*— (1) For the purposes of determining the order of succession among agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms, of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

12. *Property of a female Hindu to be her absolute property.*—

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance

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or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as Stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

13. *General rules of succession in the case of female Hindus.*–(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 14.

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband ;

(b) secondly, upon the heirs of the husband ;

(c) thirdly, upon the mother and father ;

(d) fourthly, upon the heirs of the father ; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1)—

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the orders specified therein, but upon the heirs of the father ; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

14. *Order of succession and manner of distribution among heirs of a female Hindu.*—The order of succession among the heirs referred to in section 13 shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules namely :—

Rule 1.—Among the heirs specified in sub-section (1) of

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section 13, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2.—If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.—The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of section 13 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death,

General provisions relating to succession.

15. *Full blood preferred to half blood.*—Heirs related to an intestate by full blood shall be preferred to heirs related by half blood if the nature of the relationship is the same in every other respect.

16. *Mode of succession of two or more heirs.*—If two or more heirs succeed together to the property of an intestate, they shall take the property.—

(a) save as otherwise expressly provided in this Act, *per capita* and not *per stripes ;* and

(b) as tenants-in-common and not as joint tenants.

17. *Right of child in womb.*—A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.

18. *Presumption in case of simultaneous deaths.*—Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

19. *Preferential right to acquire property in certain cases*—(1) Where, after the commencement of this Act, an interest in any

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immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the Government may, by notification in the Government Gazettee, specify in this behalf.

20. *Special provisions respecting dwelling houses.*—Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise, until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that there such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

21. *Certain widows re-marrying may not inherit as widows.*—Any heir who is related to an intestate as the widow of a predeceased son, the widow of a pre-deceased son of a pre-deceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has remarried.

22. *Murderer disqualified.*—A person who commits murder or

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abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

23. *Converts descendants disqualified* —Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives unless such children or descendants are Hindus at the time when the succession opens.

24. *Succession when heir disqualified.*—If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

25. *Disease defect, etc. not to disqualify.*—No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

Escheat

26. *Failure of heirs* —If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government ; and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

CHAPTER III

TESTAMENTARY SUCCESSION

27. *Testamentary Succession.*—(1) Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with any law for the time being in force and applicable to Hindus.

Explanation.—The interest of a male Hindu in a Mitakshara coparcenary property shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him within the meaning of this sub-section.

(2) For the removal of doubts it is hereby declared that nothing contained in sub-section (1) shall affect the right to maintenance of any heir specified in the Schedule by reason only of the fact that under a will or other testamentary disposition

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made by the deceased the heir has been deprived of a share in the property to which he or she would have been entitled under this Act if the deceased had died intestate.

CHAPTER IV

REPEALS.

28. The Hindu Law of Inheritance Act, 1997 is hereby repealed.

THE SCHEDULE

(See section 6)

HEIRS IN CLASS I AND CLASS II

CLASS I

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

CLASS II

I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter; (3) brother, (4) sister.

III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter;

IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.

V. Father's father; father's mother.

VI. Father's widow; brother's widow.

VII. Father's brother; father's sister.

VIII. Mother's father; mother's mother.

IX. Mother's brother; mother's sister.

But in the Schedule, reference to a brother or sister do not include reference to a brother or sister by uterine blood.

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APPENDIX 2

MINISTRY OF LAW

Srinagar dated the 3rd November, 1955.

The following Act passed by the Jammu and Kashmir Legislative Assembly received the assent of the Sadar-i-Riyasat on 2nd November, 1955 and is hereby published for general information.

THE JAMMU AND KASHMIR HINDU MARRIAGE ACT, 1955.

Act No. VIII of 1955.

An Act to amend and codify the law relating to marriages among Hindus.

Be it enacted by the Jammu and Kashmir State Legislature in the Sixth Year of the Republic of India as follows :-

1. *Short title, extent and commencement* :– (1) This Act may be called the Jammu and Kashmir Hindu Marriage Act, 1955.

(2) It extends to the whole of Jammu and Kashmir State and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

(3) It shall come into force from such date as the Government of Jammu and Kashmir may appoint in this behalf.

2. *Interpretation*:—The Provisions of the General Clauses Act, 1897 (Central Act X of 1891) shall, mutatis mutandis, apply so far as may be, to the interpretation of this Act in the same manner as they apply to an Act of the Indian Parliament.

3. *Application of Hindu Marriage Act,* 1955 *(Central Act XXV of* 1955) *to the State with certain modifications* :– The Hindu Marriage Act 1955 (Central Act XXV of 1955) shall apply to the whole of Jammu and Kashmir State, subject, however to the other provisions of this Act and to the modifications specified in the Schedule.

SCHEDULE [See section 3]

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Section 2.—Omit sub-section (2).

Section 3.—For Clause (b) substitute :—

"(b) 'district court' means the principal, civil court of original jurisdiction in any area and includes any other civil court which may be specified by the Government of Jammu and Kashmir by notification in the Government Gazette as having jurisdiction in respect of the matters dealt with in this Act".

Section 8.—For "State Government" substitute "Government of Jammu and Kashmir".

Section 17.—For "Indian Penal Code, 1860 (Act XLV of 1860)" substitute "Ranbir Penal Code, 1989 (Act of XII of 1989)".

Section 21.—For "Code of Civil Procedure 1908 (Act V of 1908)," substitute "Code of Civil Procedure 1957 (Act X of 1977)".

Section 29.—Omit sub-section (4).

Omit—Section 30.

An Act to amend and codify the Law relating to Marriage among Hindus.

Be it enacted by Parliament in the Sixth Year of the Republic of India as follows :—

PRELIMINARY

1. Short title and extent.—(1) This Act may be called the Hindu Marriage Act, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. Application of Act.—(1) This Act applies—

(*a*) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(*b*) to any person who is a Buddhist, Jaina or Sikh by

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religion, and

(*c*) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

EXPLANATION —The following persons are Hindus, Buddhist, Jainas or Sikhs by religion, as the case may be :—

(*a*) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion ;

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged ; and

(*c*) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Schedule Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. Definitions.—In this Act, unless the context otherwise requires.--

(*a*) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family :

Provided that the rule is certain and not unreasonable or opposed to public policy ; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family ;

(*b*) "district court" means, in any area for which there is a city civil court, that court, and in any other area the principle civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification

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in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act ;

(*c*) "full blood" and "half blood"—two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives ;

(*d*) "uterine blood"—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands ;

EXPLANATION.—In clauses (c) and (d), "ancestor" includes the father and "ancestress" the mother ;

(*e*) "prescribed" means prescribed by rules made under this Act ;

(*f*) (i) "sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father. The line being traced upwards in each case from the person concerned, who is to be counted as the first generation ;

(ii) two persons are said to be *sapinda* of each other if one is a lineal ascendant of the other within the limits of *sapindas* relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them ;

(*g*) "degrees of prohibited relationship"—two persons are said to be within the "degrees of prohibited relationship"—

(i) if one is a lineal ascendant of the other ; or

(ii) if one was the wife or husband of a lineal ascendant of the other ; and

(iii) if one was the wife of the father's or mother's brother or of the grandfather's or grandmother's brother of the other ; or

(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters ;

EXPLANATION.—For the purposes of clauses (f) and (g), relationship includes—

(i) relationship by half or uterine blood as well as by full blood,

(ii) illegitimate blood relationship as well as legitimate,

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(iii) relationship by adoption as well as by blood :

and all terms of relationship in those clauses shall be construed accordingly.

4. Over-riding effect of Act.—Save as otherwise expressly provided in this Act.—

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

HINDU MARRIAGES.

5. Conditions for a Hindu marriages.—A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely :—

(i) neither party has a spouse living at the time of the marriage ;

(ii) neither party is an idiot or a lunatic at the time of the marriage ;

(iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage ;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two ;

(v) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two ;

(vi) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, been obtained for the marriage

6. Guardianship in marriage.—(1) Whenever the consent of a guardian in marriage is necessary for a bride under this Act the persons entitled to give such consent shall be the following in the order specified hereunder, namely :—

(*a*) the father ;

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(*b*) the mother ;

(*c*) the paternal grandfather ;

(*d*) the paternal grandmother ;

(*e*) the brother by full blood ; as between brothers the elder being preferred ;

(*f*) the brother by half blood ; as between brothers by half blood the elder being preferred ;

Provided that the bride is living with him and is being brought up by him ;

(*g*) the paternal uncle by full blood ; as between paternal uncles the elder being preferred ;

(*h*) the paternal uncle by half blood, as between paternal uncles by half blood the elder being preferred ;

Provided that the bride is living with him and is being brought up by him ;

(i) the maternal grandfather ;

(j) the maternal grandmother ;

(k) the maternal uncle by full blood ; as between maternal uncles the elder being preferred :

provided that the bride is living with him and is being brought up by him.

(2) No person shall be entitled to act as a guardian in marriage under the provisions of this section unless such person has himself completed his or her twenty-first year.

(3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses, or is for any cause unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.

(4) In the absence of any such person as is referred to in sub-section (1), the consent of a guardian shall not be necessary for a marriage under this Act.

(5) Nothing in this Act shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interests of the bride for whose marriage consent is required, the court thinks it necessary to do so.

7. Ceremonies for a Hindu marriage.—(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

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(2) Where such rites and ceremonies includes the *saptapad* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

8. Registration of Hindu marriages.—(1) For the purpose of facilitating the proof of Hindu marriages; the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2) Notwithstanding anything contained in sub-section (1) the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in, any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the ommission to make the entry.

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION.

9. Restitution of conjugal rights.—(1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce.

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10. Judicial separation—(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party—

(*a*) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition ; or

(*b*) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with other party ; or

(*c*) has, for a period of not less than one year immediately preceding the presentation of the petition, been suffering from a virulent form of leprosy ; or

(*d*) has, immediately before the presentation of the petition been suffering from veneral disease in a communicable form, the disease not having been contracted from the petitioner ; or

(*e*) has been continuously of unsound mind for a period of not less than two years immediately preceding the presentation of the petition ; or

(*f*) has after the solemnization of the marriage had sexual intercourse with any person other than his or her spouse.

EXPLANATION.—In this section, the expression "desertion", with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.

(2) Where a decree for judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

NULLITY OF MARRIAGE AND DIVORCE

11. Void marriages.—Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (*i*), (*iv*) and (*v*) of section 5.

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12. **Voidable marriages.**—(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely :—

(*a*) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding ; or

(*b*) that the marriage is in contravention of the condition specified in clause (ii) of section 5 ; or

(*c*) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under section 5, the consent of such guardian was obtained by force or fraud ; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage :—

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if :—

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered ; or,

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had caused to operate or, as the case may be, the fraud had been discovered ;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied—

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged ;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage and ;

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

13. **Divorce.**—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presen-

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ted by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(i) is living in adultery ; or

(ii) has ceased to be a Hindu by conversion to another religion ; or

(iii) has been incurably of unsound mind for continuous period of not less than three years immediately preceding the presentation of the petition ; or

(iv) has, for a period of not less than three years immediately preceding the presentation of the petition been suffering from a virulent and incurable form of leprosy ; or

(v) has, for a period of not less than three years immediately preceding the presentation of the petition been suffering from venereal disease in a communicable form ; or

(vi) has, renounced the world by entering any religious order ; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had the party been alive; or

(viii) has not resumed cohabitation for a space of two years or upward after the passing of a decree for judicial separation against that party ; or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground—

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner :

Provided that in either case the other wife is alive at the time of the presentation of the petition ; or

(ii) that the husband has, since the solemnization of the marriage been guilty of rape, sodomy or bestiality.

14. No petition for divorce to be presented within three years of marriage.—(1) Notwithstanding anything contained in

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this Act, it shall not be competent for one court to entertain any petition for dissolution of a marriage by decree of divorce, unless at the date of presentation of a petition three years have elapsed since the date of the marriage :

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf allow a petition to be presented before three years have elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of three years from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said three years upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of three years from the date of marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.

15. **Divorced persons when may marry again** --When a marriage has been dissolved by a decree of divorce and either there is no right of appeal, against the decree or, if there is such a right of appeal the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again :

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

16. **Legitimacy of children of void and voidable marriages.**– Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the ligitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of

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nullity shall be deemed to be their legitimate child not withstanding the decree of nullity :

Provided that nothing contained n this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

17. **Punishment of bigamy.**— Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living ; and the provisions of section 494 and 405 of the Indian Penal Code (Act XLV of 1860) shall apply accordingly.

18. **Punishment for contravention of certain other conditions for a Hindu marriage.**—Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (*iii*), (*iv*), (*v*) and (*vi*) of section 5 shall be punishable—

(*a*) in the case of a contravention of the conditions specified in clause (*iii*) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both ;

(*b*) in the case of a contravention of the condition specified in clause (*iv*) or clause (v) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees or with both ; and

(*c*) in the case of a contravention of the condition specified in clause (*vi*) of section 5, with fine which may extend to one thousand rupees.

JURISDICTION AND PROCEDURE

19. **Court to which petition should be made.**—Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together.

20. **Contents and verifications of petitions.**—(1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and shall also state that there is no collusion between the petitioner and the other party to the marriage..

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(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints and may, at the hearing, be referred to as evidence.

21. **Application of Act V of 1908.**—Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated as far as may be, by the Code of Civil Procedure, 1901 (Act V of 1908).

22. **Proceedings may be in camera and may not be printed or published.**—(1) A proceeding under this Act shall be conducted in *camera* if either party so desires or if the court so thinks fit to do, and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.

23 **Decree in proceedings.**—(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(*a*) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, or

(*b*) where the ground of the petition is the ground specified in clause (*f*) of sub-section (1) of section 10 or in clause (*i*) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(*c*) the petition is not presented or prosecuted in collusion with the respondent, and

(*d*) there has not been any unnecessary or improper delay in instituting the proceeding, and

(*e*) there is no other legal ground why relief should not be granted, then, and in such a case but not otherwise the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring

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about a reconciliation between the parties.

24. Maintenance pendente lite and expenses of Proceedings.— Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum, as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

25. Permanent alimony and maintenance.—(1)Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the Court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order.

26. Custody of children —In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provision in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending

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and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

27. **Disposal of property.**—In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

28. **Enforcement of, and appeal from, decrees and orders.**—All decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decree and orders of the court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force.

Provided that there shall be no appeal on the subject of costs only.

SAVINGS AND REPEALS

29. **Savings.**—(1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religions, castes or sub-divisions of the same caste.

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 (43 of 1954) with respect to marriages between Hindus solemnized under that Act, whether before or after the commencement of this Act.

30. **Repeals.**—The Hindu Marriage Disabilities Removal Act, 1946 (XXVIII of 1946), the Hindu Marriages Validity Act, 1949 (XXI of 1949) the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 (Bombay Act XXV of 1946), the Bombay Hindu Divorce Act, 1947 (Bombay Act XXII of 1947), the Madras Hindu (Bigamy

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Prevention and Divorce) Act, 1949 (Madras Act VI of 1949), the Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950 (Saurashtra Act V of 1950) and the Saurashtra Hindu Divorce Act, 1952 (Saurashtra Act XXX of 1952) are hereby repealed.

(Sd.) BADRI NATH

Secretary to Govt. Law Department.

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APPENDIX 3

Copy of Revenue Minister's Notification No. S-52, dated the 20th December 1930.

Under Order No. 2 dated the 23rd August, 1930, of His Highness the Maharaja Bahadur passed on the report (dated 23rd August 1930) of the committee of Jagirs and Muafis, and conveyed under the Cabinet Secretary's letter No. 6696, dated the 26th August 1930, the following is published for enforcement and for guidance of all concerned.

(1) The existing Jagirs and Muafis shall be divided into three classes, viz.

(a) Every person enjoying a Jagir of Rs 3000 per annum and over be called a Jagirdar and the document conferring the Jagir on him be called a "Sanad"

(b) Every person enjoying a Jagir below Rs. 3000 per annum be called a "Pattadar" and the document conferring the grant be called a "Patta".

(c) Religious grants, irrespective of their value be called 'Muafis'. the holder called Muafidar and the document conferring the grant called "Irshad".

(2) a) In the case of assigments (Jagirs and Muafis) where the assignees are not proprietors but are receiving the assigned land revenue in kind under the authority of Government :-

The assigned land revenue shall be realized in cash only ; provided ;

That no alteration or modification is made in the enteries in the settlement record pertaining to the rights of such assignees before the expiry of the present settlement ;

That any conversions of payments in kind into payments in cash shall be given effect to only on the expiry of the present settlement :

That in the case of Jagirs, where the term of settlement has already expired and revised settlement has not yet been sanctioned *Galla Batai* shall cease and cash assessment be enforced ;

That conversion of payments of assigned land revenue from

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kind to cash payments shall in each case take effect from such date as is fixed and notified by the Revenue Minister.

That in cases of conversion of payment of the assigned land revenue from kind to cash, the Jagirdars concerned shall, by way of compensation for the loss which they would suffer by conversion be given an additional Jagir land of which the land revenue shall be equal to the present land revenue assignment of their existing jagirs, the Jagirdars of Jammu province being compensated by grant of land in Kashmir and *vice versa.*

Example

If the present land revenue assignment of a non-proprietory Jagirdar receiving at present assigned land revenue in kind is Rs. 1,000, he shall, on conversion of the realisations of the assigned land revenue from kind to cash payments, be granted on extra jagir, the land revenue assessment on which is about Rs. 1,000 and

that from the date, the grant of additional Jagir or Muafi takes effect in each case, the Zamindars shall not be liable to *Galla Batai,* nor shall the refusal of the assignee concerned to take possession of the extra jagir by way of compensation be taken into account.

Exception: Nothing contained herein in para 2 shall apply to such jagirdars as are proprietors as well, and take Ghalla Batai from their tenants by way of rent due to a landlord.

(3) a) Dues of Jagirdars and Muafidars shall be recoverable as arrears of land revenue only in case where the assignees receive the assignments of land revenue in cash.

(b) In case where Ghalla Batai prevails, such outstanding shall not be received as arrears of land revenue except in very special cases with the sanction of His Highness, as in the case of Jandrah and Saruinsar in which cases the special orders of His Highness, which already exist, to recover outstandings of the Jagirdars as arrears of land revenue, shall remain in force till the date the Jagirdars in question have been given possession of the additional lands under paragraph 2 above.

Provided that on the refusal of such Jagirdars to take possession of the additional Jagirs on the date then fixed, the Zamindars of those jagirs should not be held liable to have the outstanding of the Jagirdars recovered as arrears of land revenue.

(c) Nothing in this paragraph applies to Jagirdars who are also proprietors of their land and take Ghalla Batai and as such are not entitled to get their Jagirdari dues recovered as arrears

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of land revenue, in the case of such Jagirdari, the present system under which recoveries can only be made through the agency of a civil court, shall continue.

(4) The following concessions are hereby granted in favour of Jagirdars and Muafidars :-

(i) Kahcharai dues within the Jagir area shall be collected by the Lamberdar and paid to the Jagirdar in like manner as land revenue

(ii) The Jagirdar shall enjoy Forest rights within his Jagir.

(iii) Upon the death without issue of an Assamidar in a Jagir area, the assami rights of the deceased shall revert to the Jagirdar instead of the State as at present.

(iv) Jagirdars shall be exempt from the necessity of obtaining shooting licenses within their Jagirs, provided this exemption shall not apply to the relatives or collaterals who shall still be required to obtain licenses under the shooting and Game Laws.

(v) Jagirdars shall be treated as hereditary state subjects *ipso facto* and be exempt from the necessity of producing certificate of being hereditary state subject.

(vi) In cases where land within a Jagir is acquired by the state for any purpose, compensation shall be paid to the Jagirdar admissible under the rules,

if land is taken for construction of a canal, compensation shall be paid to the Jagirdar and *Abiana* charged for water utilised.

(vii) In making the appointment of Lambardar in Jagir villages the local officers may consult the Jagirdar concerned as to whether he has objection to the appointment of a particular person, and if he gives good reasons to the contrary, these grounds may be considered before passing final orders.

(5) "The principle of Primogeniture shall apply generally to all Jagirs and muafis including those specially exempted heretofore.

Provided that where the Law of Primogeniture has not been in force so far existing conditions with regard to present co-sharers in the Jagirdars shall not be disturbed as far as possible and each co-sharer who is recorded as such in the settlement records shall continue as a separate Jagirdar or a Pattadar, subject to succession being governed by primogeniture. Such co-sharers shall not have the right of adoption in case of failure of male issue, in which case, the co-shares grant shall revert to the nearest

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male collateral in his line, and in case of failure of such collateral to the parent stock ;

"Provided that so far as the parent stock is concerned adoption shall not be restricted in the above manner and may be governed by the existing rules, viz, it may be permitted, as at present, with special sanction of His Highness the Maharaja Bahadur.

Explanation :- In restricting adoption by the co-sharers in the manner set forth above, there is no intention on the part of Government to resume existing Jagir or derive any benefit from such restriction, the main object being the amelioration of the status of the Jagirdar and the prevention of disintegration of Jagirs.

(6) As at present maximum of one fourth of the revenue of a Jagir, shall be alloted for the maintenance of all its Gujarakhwars except in cases where Gujaras already exceed one fourth of the income of the Jagirdar concerned, in which cases this restriction shall not have retrospective effect. Actual disbursements within that limit may depend upon the financial condition of the Jagir and the number of Gujarakhwars to be maintained and the Jagirdar may make these arrangements themselves but Gujarakhwars shall be at liberty to appeal to Government if they consider themselves aggrieved.

All Guzaras shall be paid in cash and not by grants of land, and shall cease when a Guzarakhwar dies issueless or leaves no widow.

The Jagirdars shall be at liberty to reduce the amount of of Guzara by 25% at each succession.

Exception :- The above restrictions shall not apply to Pattas and Muafis with an annual income of less than Rs. 3000 in which cases such Pattadars and Muafidars may settle the matter themselves with their Guzarakhwars without interference of the State.

(7) The Jagirdars shall be exempt from personal appearance in Civil Courts.

(Sd) R. Dube
REVENUE MINISTER

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APPENDIX 4

Notification No. S-58, dated 12/18 April, 1937.

No. S-58.—In amplification of the recommendation of the Jagir Committee sanctioned by His Highness the Maharaja Bahadur by his order No. 2, dated 23rd August 1930, which have been notified in the Government Gazette, vide the Revenue Department Notification No. S-52, dated 20th December 1930, His Highness the Maharaja Bahadur, on the recommendation of the Cabinet has, by his order dated 20th February 1931, been pleased to order as under :—

1. For purposes of classification under paragraph I of the Revenue Department Notification No. S-52 dated 20th December 1930 :—

(i) The Status of Jagirdars and Pattadars of classes (a) and (b) shall be determined by the total amount of land revenue assigned excluding other sources of income such as Kahcharai, forests, etc, and the status shall be revisable at every revision of land revenue.

(ii) Personal Muafis shall fall into the category of Muafis and the holders thereof shall be called Muafidars irrespective of value and the nature of the Muafis.

2. In the matter of grant of compensation as per paragraph 2 of the Revenue Department Notification No. S-52, dated 20th December 1930 :—

(i) In cases where a non-proprietory Jagirdar, at present realising the assigned land revenue in grain, has the ceses on land revenue assigned to him, deduction shall be made to that extent in calculating compensation on account of conversion of the realisations of assigned land revenue from kind to cash.

(ii) In cases of grant of additional Jagir in another village, to a non-proprietory Jagirdar by way of compensation in the conversion of the realization of assigned land revenue from kind to cash, such a Jagirdar shall be entitled to Kahcharai prest rights in the other village granted by way of additional Jagir, provided that the value of the Kahcharai and the prest rights in the additional Jagir shall be taken into consideration in assessing compensations.

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(iii) Any non-proprietory Jagirdar in Forntier Districts realising the assigned land revenue in kind shall be given the option of taking compensation by way of additional Jagir in Kashmir or Jammu.

3. In the matter of concessions as detailed in paragraph 4 of the Revenue Department Notification No. S–52 Dated 20th December 1930 :—

(i) The concessions shall be allowed to Jagirdars only and not to Pattadars and Muafidars.

(ii) Cases where a part of a village is Jagir, shall be submitted individually to Government for decision as to whether the concessions will or will not be allowed.

(iii) The concessions shall be enjoyed also by proprietory Jagirdars and such Jagirdars as have been assigned a fixed cash assessment only, in like names to all other Jagirdars

(iv) The claim to Kahcharai by Jagirdars in respect of cattle belonging to other persons in Jagir villages, shall be allowed in all cases irrespective of the fact whether this right is or is not expressly conferred by Sanad of grant.

(v) Any extra rights to Kahcharai, conferred on Jagirdars by Revenue Department Notification No. S–52, dated 20th December 1930, or by the notification, shall be entered on the original document of conferment in due course.

(vi) In cases where the cattle of a Jagir village, taken into acccunt in a fixed Kahcharai demand, go out for grazing to Bahak, or to any other places beyond the boundary of the Jagir village, the extra Kahcharai tenable on account of grazing in Bahaks or in such outside places shall be given to the Jagirdars, if such Bahak or place is not within the limits of Jagir and if a separate charge is made for such Bahak or place.

(vii) In cases where the cattle of Jagir area graze in Khalsa village and *vice versa*, the Jagirdars shall be at liberty and so shall Khalsa authorities to charge standard rates on outside cattle, subject to any special grazing rights conferred.

(viii) In villages which are partly Khalsa and partly Jagir, the Kahcharai shall be opportioned between the Jagirdar and the Khalsa authorities in accordance with the rates of apportionment of the total land revenue.

(ix) The expression "first rights" appearing in paragraph 4 sub-clause (ii) of Revenue Department Notification No S–52 dated 20th December 1933, means the existing rights

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of the State in undemarcated forests. The demarcated forests are not affected in any way.

(x) For purposes of forest rights, the boundaries of the Jagir village or villages shall be the boundaries as laid down in the settlement.

(xi) The Jagirdars, to whom forests rights are given in undemarcated forests, shall be bound to follow the existing rules for undemarcated forests.

(xii) The concession regarding shooting licences shall be subject to the condition that Jagirdars shall abide by the Shikargah Rules in force.

(xiii) The Jagirdar shall be consulted at each succession to a Lambardar in Jagir village.

4 (i) After satisfaction of the conditions of the Raj Tilak Boons, all remaining waste lands in Jagirs shall be made to Jagirdars with Assami rights.

(ii) In view of the concession given to Zamindars by the Raj Tilak Boons, the concession given to Jagirdar under sub-clause (iii) of paragraph 4 of the Revenue Department Notification No. S-52 dated 20th December 1930, is cancelled. But in the case of non-bhacchare villages, Jagirdars shall, for purposes of bidding at auctions be reckoned as land holders.

5. (i) The law of primogeniture and adoption as laid down in paragraph 5 of the R. D. Notification No, S-52 dated 20th December 1930 shall apply to personal Muafis tenable during pleasure of His Highness the Maharaja Bahadur, but shall not apply to

(a) Religious Muafis

(b) Muafis tenable during life; and

(c) Sankalaf and Aghair Muafis.

(ii) For purposes of the law of primogeniture and adoption as laid down in paragraph 5 of the Revenue Department Notification No. S-52 dated, 20th December 1930 :-

(a) The original grantee shall be considered to be the person who was in possession of the Jagir when His Highness the Maharaja Gulab Singh becomes the Ruler of Jammu and such person to whom a Jagir has been granted subsequently.

(b) All hereditary Jagirs shall devolve upon the eldest legitimate son of the late Jagirdar. In the event of there being no such son the Jagir shall devolve upon the senior

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member of the senior branch of the family of the original grantee. Among the branches of a family descended from one another, that descended from any elder son of that ancestor shall be senior to that descended from a younger son of that ancestor. In the case of failure of legitimate male issue in the line of the original grantee the Jagir shall lapse to the State.

(c) In cases of dispute as to whether a person is a co-sharer in a Jagir or is a Gujarakhwar, the settlement record shall be followed.

(d) In cases where a minor and not the eldest line has in the past been recognised as Jagirdar the eldest line having been given a smaller share in the Jagir or only a Gujara, any dispute as to whether the eldest line may be continued, to be treated as co-sharer a Gujarakhwar, and the minor treated as parent stock shall be dealt with in each case on its merits.

6. In computing value for purposes of determining Gujaras under paragraph 6 of Revenue Department Notification No. S-52 dated 20th December 1930, the income of a Jagirdar or a co-sharer shall not take into account the income of other co-sharers in the Jagir.

7. Pattadars co-sharers of Jagirdars and Muafidars shall not be exempt from personal appearance in civil courts. The exemption from personal appearance in civil courts, under paragraph 7 of Revenue Department Notification No. S-52. dated 20th December 1930, shall apply to Jagirdars only.

(Sd) R. Dube

Minister for Revenue & Agriculture,
Govt. of Jammu & Kashmir.

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APPENDIX 5

The Sri Pratap Jammu and Kashmir Laws Consolidation. Act, 1997: Act No. IV of 1997.

(Sanctioned by His Highness the Maharaja Sahib Bahadur per Chief Minister's letter No. 8372. dated the 11th September, 1920 and State Council Resolution No. 1, dated 8th April, 1925. Notification No 14-L/82).

Whereas it is expedient to amend, consolidate and codify as far as possible and declare the laws generally administered and to be administered by the Council and Criminal Courts of Jammu and Kashmir State; it is hereby enacted as follows:—

Preliminary,

(1) *i.* This Act may be called the Sri Pratap Jammu and Kashmir Laws (Consolidation) Act, 1977.

ii. It extends to the whole of the State of Jammu and Kashmir.

iii. And it shall come into force on and from such date as may by notification in the Jammu and Kashmir Government Gazette be specified in this behalf.

(2) Repealed.

(3) Repealed.

(4) 1. The laws administered and to be administered by Civil and Criminal courts of the State of Jammu and Kashmir are and shall be as follows:—

(*a*) The Acts for the time being in force in the Jammu and Kashmir State;

(*b*) Proclaimations and ordinances made and passed by His Highness by virtue of his inherent authority and for the time being in force;

(*c*) The rules having the force of law made and promulgated under the provisions of any Act or Law for the time being in force in the State of Jammu and Kashmir;

(*d*) In questions regarding succession, inheritance, special property of females, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies,

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gifts, waqf, partitions, castes or religious usages or institutions the rule of decision is and shall be as follows:—

The Mohommadan law where the parties are Mohommadans and the Hindu Law in cases where the parties are Hindus, except in so far as such law has been, by this or any other enactment, altered or abolished or has been modified by any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience and has not been by this or any other enactment altered or abolished and has not been declared to be void by any competent authority;

(e) In questions relating to the law of Torts the State courts shall follow, as far as practicable, the British Indian Law.

II In cases not otherwise specially provided for, the courts shall act according to justice, equity, and good conscience.

(5) All local customs and mercantile usages shall be regarded as valid unless they are contrary to justice, equity and good conscience or have been, or shall be declared to be void by any competent authority.

(6) Repealed.

(7) Repealed.

(8) Repealed.

(9) Repealed.

(9-A) Repealed.

(10) Nothing contained in any Law or Act shall in any way be deemed to derogate from the powers of His Highness vested in him under the Constitution.

(11) *All Acts now in force or hereafter to be enacted* shall unless otherwise expressly provided, extend to the whole of Jammu and Kashmir State, but His Highness may in his discretion, by notifications in the Jammu and Kashmir Government Gazette, exempt any area or class of persons from the operation of any Act or restrict the application of any Act to any specified area or class of persons.

(12) Repealed.

The first Schedule.....repealed.

The Second Schedule .....repealed.

The third Schedule.....repealed.

The fourth Schedule.....repealed.

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APPENDIX 6

Letter of Permission to consult unpublished records of the High Court from Hon'ble the Chief Justice.

* * * * *

Copy of an application of Pt. Nila Kanth Ganjoo B. A., LL. B. Pleader Srinagar and the orders of the Chief Justice thereon.

* * * * *

I am at present working on the Customary Law prevalent in Kashmir. I request your favour of granting me permission to consult unpublished rulings of the Hon'ble High Court pertaining to custom and take notes from judgments which are relevant to my work.

Thanking you in anticipation.

* * * * *

Copy of the orders of the Hon'ble Chief Justice on the above.

* * * * *

Mr. Nila Kanth is granted permission to consult unpublished rulings of this court pertaining to custom.

* * * * *

Copy of Registrar High Court's endt, No. 8349, dated 4-10-1941 on the above

* * * * *

Copy of the above forwarded to the District Judge Srinagar for fovour of necessary action.

* * * * *

Office of the District Judge Srinagar.

No. 6298. Dated 7—10—1941.

Copy to General Record Keeper Srinagar, for compliance.

(*Sd*). District Judge Kashmir.

* * * * *

Copy to Pandit Nila Kanth Ganjoo for information.

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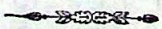
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THE END

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The Constitution of India

Part- III

Fundamental rights-

Section 26:- Freedom to manage religious affairs } subject to public order, morality and health, every religious denomination or any section thereof shall have the right:—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion

(c) to own and acquire moveable & immoveable property; and

(d) to administer such property in accordance with Law.

1954 Rajasthan 100

(b) the definition of the expression "Laws in force" is not exhaustive but is only illustrative as the word used is "includes" and not "means". Secondly under Clause 13(a) "Laws" has been defined, so as to include Custom & usage having the force of Law under section 13.

(c) ... Therefore, the fact the Customary laws continue to remain in force by virtue of Art 372 will not save it from being declared void, if it is hit by Art. 13 of the Constitution.

Secondly as the opening words of Art. 366 of the Constitution, say, the words defined in that Art. are to be assigned the particular meaning, unless the Context otherwise requires, the words "existing laws" should be understood in their broad sense, as including any kind of Law and there is no doubt that the restrictions imposed by any Customary Law cannot be more sacrosanct than that

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the restrictions imposed by the statute Law and of they are unreasonable they would be void under Art. 13, of the Constitution (d) Art: 19 is a mixed article, where certain rights are to reconcile such a law with the modern views regarding the desireability of a free disposition of immoveable property. therefore it cannot be said that the restrictions imposed on the acquiring and possession of property is a reasonable restriction in the interests of the general public so as to be saved by Art-19(5) of the Constitution.

(Approved 1962 sup. Court-1476)

کمالدین رکنی ۔ ۔ ۔ = پرسنل لا کا اطلاق 1977

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Collateral = [illegible]

Reversionary = وارث بازگشت = [illegible]

Consanguine = Children [illegible]

Children fr[illegible]

Full = Children "

True grand father = [illegible]

False " " = جد ماشہ

Sharers = ذوالفروض = (1) زوجہ (2) [illegible]

حقیقی بہن (6)

[illegible] دیگر ورثاء (10)

[illegible] حقیقی بہن۔ علاتی بہن۔ بہت دوالفروض

[illegible] ہیں۔ اگر درجہ بدلتا ہے تو نقصان

[illegible] بہت عصبہ جد بہت س

[illegible] بہن۔ اور دو دختران

[illegible] وہ بہت عصبہ جد بہت س۔

[illegible] اور باقی $\frac{23}{24}$ بہت عصبہ ترکہ اور ترکوں کو

Agnate = عصبہ = [illegible]

Cognate = Distant-Kindred = ذوی الارحام

Agnates are of three (1) عصبہ بنفسہ = [illegible]

(2) عصبہ بغیرہ = [illegible]

[illegible]

(3) عصبہ مع غیرہ

Distant-Kindred = (1) = دختر علوی [illegible]

(3) جد ماشہ

(4) جدہ ماشہ